Supreme Court, U.S.
FILED
96 362 SEP 3 1996
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1995

GARY CAMPBELL,

Petitioner,

v.

MCCARTHY BROTHERS COMPANY/CLARK BRIDGE, AS OWNER PRO HAC VICE OF BARGE #AEB1,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

GAIL GAUS RENSHAW*
L. THOMAS LAKIN
ROY C. DRIPPS
THE LAKIN LAW FIRM
251 Old St. Louis Road
P.O. Box 27
Wood River, IL 62095-0027
618/254-1127

Counsel for Petitioner
*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

104 pp

QUESTION PRESENTED FOR REVIEW

Whether A Federal Appellate Court May Sua Sponte Order Abstention In A Statutory Shipowner's Limitation Of Liability Proceeding That Was Tried To Judgment Where There are No Interests of Federalism or Comity Involved.

STATEMENT OF INVOLVED PARTIES

Petitioner, Gary Campbell, is an individual. Respondent, McCarthy Brothers/Clark Bridge is a joint venture of two privately held corporations: McCarthy Brothers Company and PCL Civil Constructors, Inc.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

STATEMENT OF INVOLVED PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF CASE 2

REASONS FOR GRANTING THE PETITION 4

I. The Seventh Circuit's Sua Sponte holding that the District Court must abstain from exercising jurisdiction over an admiralty proceeding because of a pending state court Jones Act case after the case was tried to judgment merits review by this court because it decides an important question of federal law which directly contravenes established Supreme Court precedent on abstention 4

CONCLUSION 11

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES – UNITED STATES SUPREME COURT

Bellotti v. Baird, 428 U.S. 132 (1976) 8

Brown v. Hotel Employees, 468 U.S. 491 (1984) 9

Burford v. Sun Oil Co., 319 U.S. 315 (1943) 5, 9

Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976) 6

Ex parte Green, 286 U.S. 437 (1932) 5

Langnes v. Green, 282 U.S. 531 (1931) 5

Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983) 7, 8

Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977) 9

Quackenbush v. Allstate Insurance Company, ___ U.S. ___, 116 S.Ct. 1712 (1996) 7

Railroad Commission v. Pullman Co., 312 U.S. 496 (1941) 5, 9

Thibodaux and County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959) 6

Younger v. Harris, 401 U.S. 37 (1971) 6, 9

CASES – OTHER CASES

Caleb Stone Assoc. Ltd. v. County of Albermarle, 724 F.2d 1079 (4th Cir. 1984) 10

Complaint of Dammers v. Vanderheide, 836 F.2d 750 (2nd Cir. 1988) 5

TABLE OF AUTHORITIES – Continued

Page

Grimes v. Crown Life Ins. Co., 857 F.2d 699 (10th Cir. 1988) 8

Hyde Park Partners L.P. v. Connelly, 839 F.2d 837 (1st Cir. 1988) 10

New Orleans Public Service, Inc., 491 U.S. 350 (1989) 5

Travelers Ins. v. Louisiana Farm Bureau Federation, 996 F.2d 774 (5th Cir. 1993) 10

Waldron v. McGee, 723 F.2d 1348 (7th Cir. 1983) 8

Winston v. Children & Youth Services, 948 F.2d 1380 (3rd Cir. 1991) 10

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1292(a) 10

46 U.S.C. § 56 7

46 U.S.C. § 181 ..... 1, 3, 5

46 U.S.C. § 183(a) 1

46 U.S.C. § 185 2

46 U.S.C. § 688 ..... 2, 7

46 U.S.C. § 1333 ..... 5, 7

46 U.S.C. § 1333(1) 2, 3

Fed.R.Civ.P., Supplemental Admiralty and Maritime Claims Rule F(3) 2

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Gary Campbell, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit (hereafter The Seventh Circuit).

OPINIONS BELOW

The opinion of The Seventh Circuit (A-1) is reported at 83 F.3d 821 (7th Cir. 1996). The Seventh Circuit's order denying petitioner's Motion for Rehearing is unreported. The orders of the District Court for the Southern District of Illinois are also unreported. (A-25, 26, 47, 54)

STATEMENT OF JURISDICTION

The United States Court of Appeals opinion and judgment was entered on May 3, 1996. Its order denying Gary Campbell's Motion For Rehearing was entered June 5, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Limitation of Vessel Owner's Liability Act.

46 U.S.C. § 181. Liability of masters as carriers.

46 U.S.C. § 183(a). Amount of liability; loss of life or bodily injury; privity imputed to owner; "seagoing vessel."

46 U.S.C. § 185. Petition for limitation of liability; deposit of value of interest in court; transfer of interest to trustee

The Jones Act. 46 U.S.C. § 688

Admiralty, Maritime and Prize Cases, 28 U.S.C. § 1333(1)

Fed.R.Civ.P., Supplemental Admiralty and Maritime Claims Rule F(3)

STATEMENT OF CASE

Petitioner, Gary Campbell, was employed by McCarthy Brothers Company/Clark Bridge as an iron worker to work on the construction of the Clark Bridge near Alton, Illinois. During the time he was employed by McCarthy, he spent all of his time working on a barge on the Mississippi River, which transported iron re-bar, and allowed for pre-tying and installing it in the river. The tying of the re-bar was essential to performing the installation procedure, and it could not have been done without iron workers such as Mr. Campbell.

On October 29, 1991, he sustained an injury while performing his employment duties. He retained counsel to represent him in this claim, who sent a lien letter to McCarthy Brothers dated January 28, 1993, giving written notice of the claim. Mr. Campbell subsequently, filed a Jones Act, unseaworthiness and maintenance and cure cause of action against petitioner in the Circuit Court of Madison County, State of Illinois on August 31, 1993. (A-66)

On January 27, 1994, McCarthy Brothers filed an exoneration from or limitation of liability complaint in the district court for the Southern District of Illinois pursuant to 46 U.S.C. § 181 et seq. pertaining to this injury and obtained an order enjoining all other proceedings arising from the claim. (A-54, 58) Petitioner, as a claimant, filed a motion to dissolve the injunction, which was denied. He did not appeal this order. The basis for jurisdiction in the federal court, was 28 U.S.C. § 1333(1), which provides the district courts with exclusive original jurisdiction over all admiralty cases.

After the case was reassigned to a different district court judge, each party filed motions for summary judgment. Petitioner's motion challenged the timeliness of the limitation complaint filing. Both summary judgment motions were denied (A-42) and the case was tried without a jury on the exoneration/limitation issues. The Jones Act and unseaworthiness claims were also presented to the district court.

The district court entered its order and judgment on July 18, 1995, finding in favor of Gary Campbell on all liability issues, including negligence and unseaworthiness. Damages were not proven or awarded in this proceeding, but left to the state court for determination.[1] The district court also found the complaint for exoneration/limitation of liability had not been timely filed. (A-25, 26-41)

---

[1] The district court judgment used the term "remanded for damages", evidently intending to allow the state court which had jurisdiction over the pending Jones Act case to determine damages.

McCarthy Brothers appealed. While on appeal it also filed a motion for relief from judgment in the district court alleging petitioner had accepted a settlement under Workers Compensation law, which was not ruled on due to lack of jurisdiction while the case was before the Seventh Circuit on appeal. The United States Court of Appeals For The Seventh Circuit entered its opinion reversing the finding that the complaint was untimely filed and reversing, sua sponte, the earlier district court order denying Campbell's motion to dissolve the injunction. The Court also vacated all fact findings on the liability issues and remanded with directions.

The Seventh Circuit held the district court should abstain and allow the Illinois state court Jones Act case to proceed while retaining jurisdiction for determination of the limitation question, after disposition of the state case. (A-1) Petitioner's motion for rehearing was denied. (A-76)

REASONS FOR GRANTING THE PETITION

I. The Seventh Circuit's Sua Sponte holding that the District Court must abstain from exercising jurisdiction over an admiralty proceeding because of a pending state court Jones Act case after the case was tried to judgment merits review by this court because it decides an important question of federal law which directly contravenes established Supreme Court precedent on abstention.

The Seventh Circuit impermissibly expanded the doctrine of abstention in direct contravention of the precedent established by this Court by ordering abstention,

sua sponte, in a case that has been tried to judgment which does not involve considerations of comity or federalism or further wise judicial administration.

The abstention doctrine developed as and has consistently been interpreted and applied in narrowly defined areas. It is the exception, not the rule. *New Orleans Public Service, Inc.*, 491 U.S. 350 (1989) A state filed Jones Act cause of action which is enjoined by a district court in connection with a statutorily created limitation of liability proceeding does not fall within any of these defined areas. It involves a balancing of two federal laws and rights of the individual parties, concerns which are entirely different from those underlying the abstention doctrine.

Under *Langnes v. Green*, 282 U.S. 531 (1931) and its progeny, where there is a single claimant in a limitation of liability proceeding, 46 U.S.C. § 181 et seq., the injunction of the state proceeding can be dissolved so long as the claimant stipulates to reservation of federal jurisdiction over the limitation issues so as not to violate the savings to suitor clause of 28 U.S.C. § 1333. *Ex parte Green*, 286 U.S. 437 (1932); *Complaint of Dammers v. Vanderheide*, 836 F.2d 750 (2nd Cir. 1988)

The traditional absention doctrine involves concerns of comity and federalism. First enunciated in *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), the doctrine allowed federal district courts to defer exercising their jurisdiction where there is a constitutional claim on a state statute that has not been interpreted by the state.

This Court subsequently approved two other types of abstention. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943),

permitted federal courts to refrain from exercising jurisdiction in those cases where there is a complex state regulatory scheme which could be disturbed by resolving a federal case, and *Younger v. Harris*, 401 U.S. 37 (1971) precluded federal courts from enjoining pending state criminal proceedings.[2]

In all of these categories of abstention the paramount concern is federal/state relations. Some state interest exists which potentially or actually conflicts with the adjudication of the federal case. And although where the federal court defers jurisdiction, rather than dismisses the case before it, a somewhat more liberal application is afforded, *Thibodaux and County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 79 S.Ct. 1060, 3 L.Ed.2d 1163 (1959) it is only where comity and federalism concerns exist that the doctrine becomes operative.

The fourth category of abstention stays federal actions where there is a parallel pending state proceeding and "exceptional circumstances" exist which justify letting the state decide the controversy. *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). This type of abstention differs from the traditional three categories because its rationale is based upon concerns of "wise judicial administration" rather than comity and federalism. It is also more limited in application. *Colorado River*, 424 U.S. at 821. A stringent interpretation has been

---

[2] *Younger* abstention has been held applicable to certain civil state proceedings, but there must be important state interests involved. *Middlesex County Ethics Committee v. Garden State Bar Assn.*, 457 U.S. 423 (1982).

given to Colorado River abstention. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S.1 (1983) ["the clearest of justifications", 460 U.S. at 25, 26].

The abstention doctrine has consistently been construed in a restrictive manner, most recently in *Quackenbush v. Allstate Insurance Company*, ___ U.S. ___, 116 S. Ct. 1712 (1996) with this court pronouncing that the balance between federal interests and state interests "only rarely favors abstention." at 1726.

Abstention, sua sponte, on appeal in the case at bar is not authorized under any of the established categories. Here, the federal court proceeding is an admiralty limitation of liability proceeding over which there is exclusive federal jurisdiction and the state court proceeding is a Jones Act and unseaworthiness cause of action governed by federal statute 46 U.S.C. § 688 and general maritime law.

There are no competing federal and state interests involved. Admiralty cases have traditionally been the province of the federal courts. Moreover, the Jones Act case in state court would have been tried under federal law, so the state of Illinois has no interests which could be jeopardized. The reason the case is in state court is because the Jones Act, expressly incorporates that provision of the Federal Employers Liability Act, which provides for concurrent jurisdiction, 46 U.S.C. § 56, 46 U.S.C. § 688 and the "savings to suitors" clause allows state court jurisdiction of the general maritime claim. 28 U.S.C. § 1333. Finally, there are no unsettled constitutional questions in the case.

Colorado River abstention is likewise inapplicable to the case *sub judice*, but for different reasons. To abstain under *Colorado River*, the district court must weigh the federal court's obligation to exercise jurisdiction against: 1) which court first had jurisdiction over the res; 2) the inconvenience of the federal forum; 3) the possibility of piecemeal litigation; and 4) whether the state court suit was filed first. *Colorado River*. The fourth factor has been construed to mean consideration of the progress of the two suits. *Moses Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983).

Neither law suit involves a *res* and inconvenience is also not a factor. The latter two factors are, however, highly relevant. The court's abstention order actually creates piecemeal litigation, because there will be at least two more trials due to abstention.

Additionally, the completion of the trial in the federal case demonstrates judicial economy will not be served by abstention. As the Tenth Circuit noted, under a *Colorado River* abstention analysis, once a case has been tried on the merits, it would be rare to find the interests of conserving judicial resources served by abstention. *Grimes v. Crown Life Ins. Co.*, 857 F.2d 699 (10th Cir. 1988).

While the Seventh Circuit was correct in stating abstention can be raised sua sponte, *Bellotti v. Baird*, 428 U.S. 132, 143 n.10 (1976), even after trial, *Waldron v. McGee*, 723 F.2d 1348, 1350 (7th Cir. 1983) [relied on by Seventh Circuit in this case. (A-17, 18)], these cases, as

well as others addressing sua sponte abstention,[3] have involved the traditional categories of abstention, *Pullman, Younger* and *Burford*. This is because of the importance of the comity and federalism concerns.

Where those concerns are not involved, sua sponte abstention is unwarranted, especially after the case has been tried on the merits and the abstention issue is not appealed. At this point the issue has been abandoned or waived. Although the Seventh Circuit does not expressly address waiver, its holding effectively declares there can be no waiver in any abstention situation.

Even if the circumstances in this case originally supported abstention under *Colorado River* principles, once the case is tried to judgment the balance no longer favors abstention. The trial on the merits eliminates any justification for sua sponte abstention.

Furthermore if the party who would perhaps most benefit from the abstention does not press the issue, it should be deemed waived or abandoned. On two occasions this Court has indicated the state cannot be forced back into state court by the federal court. *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471 (1977); *Brown v. Hotel Employees*, 468 U.S. 491, 500, n.9 (1984). Yet there remains confusion among the circuits on this point. The Fourth Circuit has not recognized waiver under these

---

[3] See *Pustell v. Lynn Public Schools*, 18 F.3d 50 (1st Dist. 1994) [Pullman abstention]; *Time Warner Cable v. Doyle*, 66 F.3d 867, 882 (7th Cir. 1995) and *O'Neill v. City of Philadelphia*, 32 F.3d 785, 786, n.1 (3rd Cir. 1994) [Younger abstention]. *Front Royal & Warren City Ind. Park v. Front Royal*, 945 F.2d 760 (4th Cir. 1991) [Burford abstention].

circumstances. *Caleb Stone Assoc. Ltd. v. County of Albermarle*, 724 F.2d 1079 (4th Cir. 1984). Conversely, the First, Third, and Fifth Circuits have held abstention claims were waived or abandoned where not timely raised or preserved for appeal. *Hyde Park Partners L.P. v. Connelly*, 839 F.2d 837 (1st Cir. 1988); *Winston v. Children & Youth Services*, 948 F.2d 1380 (3rd Cir. 1991); *Travelers Ins. v. Louisiana Farm Bureau Federation*, 996 F.2d 774 (5th Cir. 1993).

The Seventh Circuit goes even further than the Fourth Circuit on this issue. It refuses to allow a private individual to abandon his objection to the injunction entered by the district court and submit his federal Jones Act claims to the district court, as petitioner, Gary Campbell, did. Petitioner could have have appealed the court's denial of his motion to dissolve the injunction under 28 U.S.C. § 1292(a), which authorizes interlocutory appeals from orders granting and denying injunctions but did not.[4] He did not appeal the judgment because it was in his favor. McCarthy Brothers did not raise the issue of abstention in its appeal and the Seventh Circuit did not request briefs on the issue.

The Seventh Circuit opinion claims to protect the rights of Petitioner even though he did not pursue these rights after the district court denied his motion to dissolve the injunction because it presumes he would prefer

---

[4] The court below erroneously relied on *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988) for finding the denial of the injunction order could not be reviewed prior to final judgment. *Gulfstream* involved a motion for stay, not an injunction order authorized by statute.

to be in state court since the Seventh Circuit might reverse or remand on the merits.

Petitioner contends that the issue of seaman status has been determined and he very well may not want to return to state court. First he has a judgment in his favor. Secondly, since seaman status was already determined, McCarthy Brothers is not entitled to complete relief from judgment based on the workers' compensation settlement. However, if he is forced to relitigate the issue, the receipt of a settlement under state workers compensation law may preclude him from pursuing his Jones Act cause of action.

The concerns for an individual's rights are not a primary consideration under the abstention doctrine. Consequently the Seventh Circuit's holding in this case should be addressed by this Court.

CONCLUSION

Based on these reasons the petition for writ of certiorari should be granted.

Respectfully Submitted,

GAIL GAUS RENSHAW*
L. THOMAS LAKIN
ROY C. DRIPPS
THE LAKIN LAW FIRM, P.C.
251 Old St. Louis Road
Post Office Box 27
Wood River, Illinois 62095
Telephone: (618) 251-1127

Counsel for Petitioner
*Counsel of Record

INDEX TO APPENDIX

Page

Opinion of the United States Court of Appeals For the Seventh Circuit [83 F.3d 821 (7th Cir. 1996)] ..... App. 1

Judgment of the United States Court of Appeals For the Seventh Circuit (May 3, 1996) ..... App. 24

Judgment of the United States District Court For the Southern District of Illinois remanding case to Circuit Court of Madison County, Illinois Entered July 18, 1995 ..... App. 25

Memorandum and Order of United States District Court For the Southern District of Illinois finding claimant was a "seaman" under the Jones Act, 46 U.S.C. §688; petitioner was liable for claimant's injuries due to negligence and unseaworthiness; privity/knowledge of unseaworthy condition; failure to prove value of freight; and complaint untimely filed. Entered July 18, 1995 ..... App. 26

Order of United States District Court For the Southern District of Illinois denying Petitioner's and Claimant's Motions For Summary Judgment. Entered March 2, 1995 ..... App. 42

Order of United States District Court For the Southern District of Illinois denying claimant's Motion to Dissolve Injunction. Entered August 4, 1994 ..... App. 47

Order of United States District Court Enjoining Proceedings. Entered January 27, 1994 ..... App. 54

Complaint For Limitation of Liability. Filed January 27, 1994 ..... App. 58

INDEX TO APPENDIX – Continued

Page

Complaint filed by Gary Campbell in Circuit Court of Madison County, Cause No. 93-L-899. Filed August 31, 1993 .....App. 66

Order of United States Court of Appeals for the Seventh Circuit denying appellee's Motion for Rehearing. Entered June 3, 1996 .....App. 76

Jones Act, 46 U.S.C.A. §688 (1988) .....App. 77

Limitation of Shipowners' Liability Act,

46 U.S.C.A. §181.....App. 79

46 U.S.C.A. §183(a) .....App. 80

46 U.S.C.A. §185.....App. 82

Admiralty, Martime and Prize Cases, 28 U.S.C.A. §1333(1).....App. 83

Supplemental Admiralty and Maritime Claims Rule F(1) (2) (3).....App. 84

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 95-2880

IN THE MATTER OF THE COMPLAINT OF:

McCARTHY BROTHERS COMPANY/CLARK BRIDGE,
as Owner Pro Hac Vice of Barge #AEB1 for
Exoneration from or Limitation of Liability,

Petitioner-Appellant.

Appeal from the United States District Court
for the Southern District of Illinois,
East St. Louis Division.
No. 94 C 72 – **Paul E. Riley, *Judge.***

ARGUED APRIL 1, 1996 – DECIDED MAY 3, 1996

Before CUMMINGS, EASTERBROOK and ROVNER, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* This case involves a conflict between the Limitation of Liability Act, 46 U.S.C. §§ 181 et seq. ("Limitation Act"), which gives shipowners a right to seek limitation of liability in federal court for maritime injuries, and the "saving to suitors" clause of 28 U.S.C. § 1333(1), which gives claimants a right to seek common-law remedies outside of the federal admiralty forum. Claimant Gary Campbell brought a state court action seeking damages for injuries sustained on a vessel chartered by McCarthy Brothers Company. McCarthy

then sought to limit its liability in federal district court. The district court entered an order restraining further litigation in state court and then proceeded to resolve all issues relating to McCarthy's liability and the availability of limitation under the Limitation Act. We now hold that the district court should have abstained on the liability issue, permitting Campbell to proceed in state court under the "saving to suitors" clause, but retained jurisdiction on the limitation questions pending the outcome of the state proceeding.

I.

Campbell was employed by McCarthy as an ironworker on the construction of the Clark Bridge over the Mississippi River near Alton, Illinois. His job was to pre-tie iron rebar for installation in the river bed, which consisted of fastening iron rods together with wire. Campbell worked on Barge No. AEB1, which McCarthy had chartered for the project. The parties dispute whether he was a maritime worker. The barge remained moored most of the time and served as a work deck. However, when the barge was towed to the bridge site for rebar installation, Campbell and other iron workers were sometimes present. Maritime duties on the barge, such as handling lines, were performed by a deckhand.

The accident that produced this litigation occurred on October 29, 1991, approximately six weeks after Campbell commenced working for McCarthy. Work on the barge produced a considerable amount of debris, and the deckhand was responsible for clearing all waste from walkways and work areas. When Campbell returned from

retrieving additional supplies, his attention was momentarily diverted and he stepped on a piece of scrap wood, causing him to fall. The parties dispute both the specifics of the fall and the district court's finding that the deckhand was exclusively responsible for clearing debris. Campbell sustained two herniated discs that required surgery.

In 1992, Campbell filed a worker's compensation claim with the Illinois Industrial Commission, which McCarthy's compensation carrier, Commercial Union Insurance Company ("Commercial Union"), began paying. Then on January 28, 1993, McCarthy received the following letter from Campbell's attorney:

> NOTICE OF REPRESENTATION
> AND ATTORNEY'S LIEN
>
> You are hereby notified that we have been retained to represent Gary Campbell for injuries he sustained on or about October 29, 1991, for which he claims you are responsible.
>
> Please be advised that we have a contract with our client whereby we are to receive thirty-three and one third percent (33 1/3%) of any sums of money paid to him as a result of the injuries and by this letter we are putting you on notice of our attorney's lien.
>
> Any medical authorization in your possession given to you by our client is hereby revoked at the request of our client and you are instructed to take no further action which would involve the use of any prior authorization.
>
> Please forward this letter immediately to your insurance carrier so they may contact us regarding this claim.

On August 31, 1993 – more than six months after this letter was sent to McCarthy – Campbell filed a complaint in Illinois state court alleging Jones Act negligence, unseaworthiness, and maintenance and cure. Pursuant to the Limitation Act and on January 27, 1994, McCarthy filed an action in the district court for exoneration or limitation of liability ("limitation action"). On the same day, the district court entered an order restraining further prosecution of the state court action.

The limitation action proceeded in the district court in a rather confused manner. After filing a claim for damages and an answer to McCarthy's district court complaint, Campbell moved to dissolve the federal restraining order so that he could proceed in state court. The district court denied the motion, in part because Campbell failed to make adequate stipulations to protect McCarthy's right to limit liability in the state court proceeding. Commercial Union also filed a claim for damages in the limitation action, claiming the right of recovery from Campbell of any damages he might receive from McCarthy to the extent of payments already made by Commercial Union to Campbell. After completing discovery, both Campbell and McCarthy moved for summary judgment – Campbell on the basis that McCarthy filed its district court petition more than six months after receiving the attorney's lien letter of January 28, 1993, in violation of 46 U.S.C. § 185, and McCarthy on the basis that Campbell was not a Jones Act seaman. Thereafter on October 21, 1994, the case was reassigned from Judge Stiehl to Judge Riley upon his appointment to the federal bench. He denied both motions for summary judgment and set the case for bench trial on March 13, 1995. In

denying Campbell's motion for summary judgment, Judge Riley stated that the timeliness of McCarthy's petition was not ripe for discussion since the court would not have to reach the issue if Campbell lost on the merits.

After trial, the court issued its memorandum and order. Judge Riley concluded that the January 28, 1993, letter constituted a written notice of claim sufficient to trigger the six-month limitation period set forth in 46 U.S.C. § 185, and that McCarthy's limitation action was therefore filed too late. He thus dismissed McCarthy's complaint and "remanded" the case to state court for a determination "of the amount of damages consistent with the terms of this Order." By the "terms of this Order," Judge Riley intended that the state court be bound by five additional conclusions of law in his memorandum and order, that: (1) Campbell was a Jones Act seaman; (2) McCarthy's negligence and the unseaworthiness of Barge No. AEB1 caused Campbell's injuries; (3) Campbell was not contributorily negligent; (4) McCarthy had sufficient privity and knowledge such that it was not entitled to limitation of liability; and (5) McCarthy had failed to prove the value of the limitation fund, which is the value of the vessel and its cargo.

McCarthy appeals the dismissal of its complaint on timeliness grounds as well as each of the district court's additional findings. Neither party argues on appeal that the district court improperly denied Campbell's motion to dissolve the restraining order against the state court proceeding. Contrary to what either party likely expected on appeal, we find that the district court erred in not permitting Campbell to proceed in state court. Only a review of the arcane jurisdictional rules for limitation

actions will illustrate why the proceedings in the district court were confused and why this Court ought to raise the issue of abstention *sua sponte* and permit Campbell to proceed in state court, even though the case was fully tried in district court.

II.

There exists in admiralty law an inherent conflict between the right of claimants to seek common-law remedies before a jury, typically in state court, and the right of shipowners to limit their liability to claimants in federal court. The Limitation Act vests in federal courts exclusive jurisdiction, pursuant to their admiralty jurisdiction under 28 U.S.C. § 1333(1), to decide whether a shipowner's liability should be limited in certain circumstances. We have previously summarized the history and purposes of the Limitation Act, *Joyce v. Joyce*, 975 F.2d 379, 383-384 (7th Cir.1992), but suffice it to say that the Act encourages ship-building and investment by limiting a shipowner's liability to the amount of his interest in the ship. *Norwich & N.Y. Transp. Co. v. Wright*, 80 U.S. (13 Wall.) 104. When the federal court exercises its exclusive jurisdiction, it must necessarily enjoin proceedings in state court. But this result is in direct conflict with the "saving to suitors" clause of 28 U.S.C. § 1333(1), which excepts from the district courts' exclusive jurisdiction over admiralty matters the right of suitors to seek "all other remedies to which they are otherwise entitled." The conflict is significant. Claimants have no right to a jury in admiralty actions, *Waring v. Clarke*, 46 U.S. (5 How.) 441, 458-460, and thus lose their right to pursue common-law

remedies before a jury when forced into admiralty court under the Limitation Act.

The typical scenario is as follows. Claimant files a complaint in state court. The shipowner then petitions the district court for limitation of liability pursuant to the Limitation Act, which must be done "within six months after a claimant shall have given to or filed with such owner written notice of claim. . . . " 46 U.S.C. § 185. Once properly filed, the district court retains exclusive jurisdiction over the matter and all claims against the shipowner must cease. 46 U.S.C. § 185; *Metropolitan Redwood Lumber Co. v. Doe,* 223 U.S. 365. If the shipowner so requests, the district court may enjoin other proceedings against it. Fed.R.Civ.P. Supp. R. F(3). The district court is to notify all potential claimants to file their claims within a specified period of time. Fed.R.Civ.P. Supp. R. F(4). The court then tries the case and makes a determination as to all matters on the merits. *In re Complaint of Dammers & Vanderheide & Scheepvaart Maats Christina B.V.,* 836 F.2d 750, 755 (2d Cir.1988).

Because of the inherent conflict between the "saving to suitors" clause of 28 U.S.C. § 1333(1) and exclusive federal jurisdiction for limitation actions, a shipowner's guarantee of a federal admiralty forum is tentative at best. Failure to meet statutory prerequisites is one way the shipowner may lose the guarantee. Where the shipowner fails to meet certain prerequisites for the limitation action, the claimant's original choice of a state forum will return to the forefront. For example, Section 185 of the Limitation Act lists two requirements: filing within the six-month period and offering security to the court in the

amount of the claimed limitation fund. State court proceedings must cease under Section 185 only when these requirements are met. 46 U.S.C. § 185; *In re Complaint of Tom-Mac, Inc.*, 76 F.3d 678 (5th Cir.1996). In addition, the Limitation Act provides that the liability of a shipowner for any loss or damage "done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." 46 U.S.C. § 183(a). The shipowner has the ultimate burden of proving lack of privity or knowledge in federal court. *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1303 (7th Cir.1992). Where the shipowner fails to establish lack of privity or knowledge, the federal court lacks the power under the Limitation Act to limit his liability, and the federal court must relinquish exclusive jurisdiction and allow the claimant to proceed in state court. *Joyce*, 975 F.2d at 385.[1]

A shipowner might also lose the guarantee of a federal admiralty forum even where he meets all of the

---

[1] *Joyce* states that the dismissal was for lack of subject matter jurisdiction. 975 F.2d at 387. This contention is likely inaccurate – the Supreme Court, though in dicta, has stated that failure to demonstrate lack of privity or knowledge does not divest the district court of jurisdiction. *Langnes v. Green*, 282 U.S. 531, 534-535. *Just v. Chambers*, 312 U.S. 383, 386, again makes the point explicitly. The importance of our holding in *Joyce* and the analysis in *Langnes* and *Just*, however, is that the claimant's preference for a state forum returns to the forefront when the shipowner fails to meet one of the statutory prerequisites, and that is true whether or not we call it jurisdictional.

statutory prerequisites. The conflict created by the "saving to suitors" clause has generated a doctrine of abstention, first enunciated in *Langnes v. Green*, 282 U.S. 531. In *Langnes*, the Supreme Court was presented with the typical scenario – claimant sued in state court and shipowner later brought a limitation action in federal court. The Court first acknowledged the power of the state court to entertain a shipowner's limitation claim and afford relief under the Limitation Act. *Id.* at 540. However, the shipowner chose federal court, which he had a right to do. Given the competence of both courts to fully resolve the matter, "the question which arose was not one of jurisdiction, but . . . was whether as a matter of discretion that jurisdiction *should* be exercised [by the federal court] to dispose of the cause." *Id.* at 541 (emphasis added). The Court resolved the conflict in favor of federal court abstention:

> The difference in the effect of adopting one or the other of the two alternatives presented to the district court was obvious. To retain the cause would be to preserve the right of the shipowner, but to destroy the right of the suitor in the state court to a common-law remedy; to remit the cause to the state court would be to preserve the rights of both parties. The mere statement of these diverse results is sufficient to demonstrate the justice of the latter course; and we do not doubt that, in the exercise of a sound discretion, the district court, following that course, should have granted respondent's motion to dissolve the restraining order so as to permit the cause to proceed in the state court, retaining, as a matter of precaution, the petition for a limitation of liability to be dealt with in the

> possible . . . event that the right of the petitioner to a limited liability might be brought into question in the state court. . . . The failure to do this, in our opinion, constituted an abuse of discretion subject to the correcting power of the appellate court below and of this court.

Id. at 541-542. Abstention in such circumstances – with some refinements outlined below – is still the law. See, *e.g., In Re Complaint of Port Arthur Towing Co.*, 42 F.3d 312, 316 (5th Cir.1995), certiorari denied, 116 S.Ct. 87; *Gorman v. Cerasia*, 2 F.3d 519, 524-525 (3d Cir.1993); *In re Complaint of Midland Enters., Inc.*, 886 F.2d 812, 814 (6th Cir.1989); *Dammers*, 836 F.2d at 755; *Jefferson Barracks Marine Serv., Inc. v. Casey*, 763 F.2d 1007, 1009-1010 (8th Cir.1985).

Thus where the case falls within the *Langnes* rule of abstention, the district court permits proceedings in state court to go forward on the question of liability and retains jurisdiction over any question that might arise as to the shipowner's right to limit his liability. *Ex parte Green*, 286 U.S. 437. If the shipowner either (1) wins in the state court or (2) loses, but only in an amount less than the value of his ship and its cargo, then the need for further proceedings in federal court is obviated. If the shipowner is found liable for more than the value of his ship and its cargo in the state action, further proceedings in the federal limitation action may be necessary, but only where the claimant contests the limitation.

In summary, the conflict between the "saving to suitors" clause and exclusive federal court jurisdiction over admiralty claims has generated complex rules governing both where and when the parties' claims should be resolved. The shipowner's right to a federal admiralty

forum is tentative: the claimant's preference for a different forum will prevail where the shipowner fails to meet certain statutory prerequisites and where the situation is appropriate under established case law for federal court abstention. When the federal court abstains, it retains jurisdiction over the limitation of liability question pending resolution of the liability issues.

III.

Given this understanding of limitation actions, we find no precedent for the district court's disposition of McCarthy's limitation action. It is unnecessary to reach the merits of the court's final memorandum and order to so conclude. Assuming for the moment that the district court properly denied Campbell's motion to dissolve the restraining order, the court made two other findings, either one of which required under established law that Campbell be returned to state court. First, the court found that McCarthy's petition was not filed within the requisite six-month period under 46 U.S.C. § 185. That should have ended the matter in federal court, because Section 185 states that other proceedings must cease only when the procedures of Section 185 are satisfied. See *Tom-Mac, supra*. Second, the district court concluded that McCarthy failed to demonstrate lack of privity or knowledge; under *Joyce, supra,* that also should have ended the matter in federal court. The court's further finding that McCarthy failed to prove the value of the vessel and its cargo may also have been an independent basis for sending the case back to state court, though the Supreme Court in dicta has suggested that shipowners should be given a second

chance in federal court to value the limitation fund correctly. *Black Diamond S.S. Corp. v. Robert Stewart & Sons, Ltd.*, 336 U.S. 386, 394-395.

The district court simply disregarded Campbell's significant interest in a state forum under the "saving to suitors" clause. This is most clearly revealed in its rejection of Campbell's motion for summary judgment in which it declined to address the six-month limitation period, stating that it would not need to decide the issue if Campbell lost on the merits. The court ultimately found that McCarthy's petition was untimely, permitting Campbell to return to state court, but only after ruling on the merits of this case so as to bind the state court in its determination. The irony of it all, as will be seen, is that the district court should have abstained from the very beginning.

To dispose of this case properly, we must address three questions. First, the timeliness of McCarthy's petition under 46 U.S.C. § 185 is an issue preliminary to any disposition by this Court – both to the validity of the district court's additional findings if we were to review them or, if we find that abstention under *Langnes* is appropriate, to the ability of the district court to retain jurisdiction on the limitation of liability issue. Second, we address whether this is an appropriate case for raising the question of abstention on appeal, given the failure of the parties to do so and the fact that the case was fully tried in the district court. Finally, assuming an affirmative answer to the second inquiry, the question remains whether under *Langnes* the district court should have granted Campbell's motion to dissolve the restraining order.

A.

As noted, Section 185 states that a shipowner must petition the district court for limitation of liability within six months after receiving "written notice of claim" from a claimant. 46 U.S.C. § 185. The Limitation Act does not define "written notice of claim" and cases interpreting the language are surprisingly scant. Although this Court has stated that the six-month period shall be strictly construed and that ambiguities shall be resolved against the shipowner, *Ohio River Co. v. Carrillo*, 754 F.2d 236, 238-239 (7th Cir.1985), we have never addressed what constitutes a written notice of claim sufficient to trigger the six-month period. The most authoritative case states that a letter sent to a shipowner by a claimant is sufficient to trigger the six-month period if (1) it informs the shipowner of an actual or potential claim (2) which may exceed the value of the vessel (3) and is subject to limitation. *Doxsee Sea Clam Co. v. Brown*, 13 F.3d 550, 554 (2d Cir.1994). As to the latter of these requirements, the written notice of claim must reveal a "reasonable possibility" that the claim made is one subject to limitation. *Tom-Mac*, 76 F.3d at 683.

The district court held that the January 28, 1993, attorney's lien letter to McCarthy constituted written notice of claim under Section 185. The court relied on language in the letter stating that Campbell suffered injuries "for which he claims you are responsible" and on a request in the letter that the claim be forwarded to McCarthy's insurance carrier. We hold that the letter was not a sufficient written notice of claim. First, in light of the fact that Campbell had already filed a worker's compensation claim, the letter failed to inform McCarthy of

an actual or potential claim that is subject to limitation. McCarthy could have reasonably construed the letter as relating to the worker's compensation claim rather than some future claim for damages. The letter held sufficient by the Second Circuit in *Doxsee* was much more specific. Unlike the attorney's lien letter here, the *Doxsee* letter refers to a specific claim for which the attorney had been retained and the "Re:" line referenced a present controversy – "Christian Brown v. Doxsee Sea Clam Company." Also unlike the situation here, there was no existing claim in *Doxsee* that could have confused the intent of the letter. Even assuming the letter gave adequate notice of a claim subject to limitation, nothing indicates that the claim would exceed the value of the vessel. On the other hand, the correspondence in *Doxsee* itemized medical bills, indicating a reasonable possibility that the claims would exceed the value of the vessel. 13 F.3d at 554-555.

Our conclusion is bolstered by the purpose of the six-month limitation period in 46 U.S.C. § 185. Before the 1936 amendments to the Limitation Act, which added the six-month requirement, shipowners caused undue delay by waiting to file limitation actions until after a trial on the merits. The limitation period in Section 185 was added to avoid such delay. *Jung Hyun Sook v. Great Pac. Shipping Co.*, 632 F.2d 100, 103 (9th Cir.1980). Thus in the typical case, the filing of a complaint serves as written notice of claim. See *Tom-Mac, supra*. Before a complaint is filed, delay on the part of the shipowner is harmless – certainly no judicial proceedings have begun – and the purpose of the six-month limitation is not yet actuated. The real danger in failing to hold claimants to a fairly high level of specificity in letters is that the claimant may

nullify a shipowner's right to file a limitation action by sending a cryptic letter and then waiting more than six months to file a complaint.

We conclude that the January 28, 1993, letter was not a sufficient written notice of claim. Rather, McCarthy received written notice of claim on or about August 31, 1993, when Campbell filed a complaint in state court, and thus McCarthy timely filed its limitation action in district court on January 27, 1994.

B.

The parties do not raise the issue of abstention on appeal. Not surprisingly, Campbell does not appeal the denial of his motion to dissolve the restraining order, preferring instead that we affirm on the merits (he won below). But the parties' failure to raise the issue is no impediment. An appellate court may raise abstention *sua sponte*: "[T]he court has the power and in an appropriate case the duty to order abstention, if necessary for the first time at the appellate level, even though no party is asking for it." *Waldron v. McAtee*, 723 F.2d 1348, 1351 (7th Cir.1983). Whether this is an appropriate case raises a number of questions. For example, we have refused to raise abstention *sua sponte* where the question whether to abstain required a fact-specific inquiry better left to the discretion of the district court. *General Ry. Signal Co. v. Corcoran*, 921 F.2d 700, 708-709 (7th Cir.1991). This is not such a case, as the Court need only review the sufficiency of Campbell's stipulations in his motion to dissolve the district court's restraining order. See, *e.g.*, *Dammers*, *supra*.

Another question is what weight should be given to the fact that the district court has already tried the case. We have stated that where a case has already gone to trial, the presumption should be against abstention. *Mazanec v. North Judson-San Pierre Sch. Corp.*, 763 F.2d 845, 847 (7th Cir.1985). In *Mazanec*, this Court reversed a trial court's decision to abstain after the case had been tried. Although *Mazanec* did not present the question whether an appellate court should raise abstention *sua sponte*, the presumption against abstention after trial logically extends (and probably with greater force) to appellate cases. See, *e.g.*, *Serpas v. Schmidt*, 827 F.2d 23, 27 n. 2 (7th Cir.1987), certiorari denied, 485 U.S. 904. The presumption has limited applicability, though, when the issue of abstention was, as here, raised prior to trial:

> At least [the presumption against abstention holds] where neither party requested abstention before trial. . . . Maybe if one party had requested abstention before trial the fact that the judge denied the request and went on to try the case should not count against the request, for the party who made it might well have lacked any appellate remedy against the denial.

Mazanec, 763 F.2d at 847. Campbell did raise abstention prior to trial in his motion to dissolve the restraining order (and arguably again in his motion for summary judgment). Orders granting abstention are appealable as final judgments. *Mazanec v. North Judson-Pierre School Corp.*, 750 F.2d 625 (7th Cir.1984). Thus if the district court had granted Campbell's motion, McCarthy could have appealed immediately. Such was the case in *Midland Enterprises, supra*, and *Gorman, supra*. But the district court's denial of the motion, analogous to and having the

same effect as an order denying a stay of federal court proceedings, was probably not immediately appealable by Campbell. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271; *Mazanec*, 763 F.2d at 847; but see *Jefferson Barracks, supra* (interlocutory appeal taken from issuance of stay, but basis for appellate jurisdiction not discussed). Given that the district court's determination was likely not appealable at the time by Campbell, thereby requiring a trial, we will not apply the *Mazanec* presumption against abstention. Accord *Port Arthur, supra* (reviewing stay of state court proceedings though matter was fully litigated in federal court).

A final and more significant concern about raising abstention *sua sponte* in this Court derives from our reasoning in *Waldron v. McAtee, supra.* In *Waldron*, we raised without prompting by the parties the doctrine of *Pullman* abstention, *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, by which federal courts abstain to avoid unnecessary constitutional determinations. We did so, at least in part, because a court abstaining in such circumstances "is not seeking to protect the rights of one of the parties; it is seeking to promote a harmonious federal system by avoiding a collision between the federal courts and state . . . legislatures." *Waldron*, 723 F.2d at 1351. By contrast, abstention in a limitation action is primarily justified to protect the rights of the claimant. *Langnes*, 282 U.S. at 541. Federalism concerns are minimal at best, particularly since a claimant might obtain a jury trial in a federal civil proceeding (as opposed to an admiralty proceeding). Thus the important question here is whether Campbell still has rights that we ought to protect even though he did not raise abstention on appeal. The simple answer is,

Campbell could lose in this Court if we reached the merits, or we could dispose of the case such that the district court would have to re-evaluate the merits. Based on Campbell's motion to dissolve the restraining order, it may be presumed that in either case he would prefer once again to be in state court.

More fundamentally, though, the only route by which we could conclude the matter in this Court, and thus avoid renewing Campbell's interest in abstention, would require us to examine the merits of the district court's five findings in its memorandum and order. And those findings, as we have said, were entirely gratuitous once it had dismissed McCarthy's petition as untimely filed. The situation here is no doubt exceptional due to the confused proceedings below. As in *Waldron*, this Court ought to be hesitant when raising abstention *sua sponte* where there is no systemic interest in doing so, such as federalism concerns.

That said, there is at least one systemic reason for reviewing the district court's refusal to lift the restraining order. As this case amply demonstrates, when a district court wrongly stays a proceeding and then finds in favor of the state court plaintiff on the merits, the decision to stay goes essentially unreviewed unless the appellate court raises abstention *sua sponte*. Doing so serves the systemic goal of warning against the exercise of jurisdiction over liability claims in future limitation actions that fall under *Langnes*. While there may or may not be value to the litigants in correcting an unappealed abuse of discretion (we believe there is value to Campbell), operation of the complicated admiralty jurisdictional rules will hopefully be facilitated in future cases.

C.

This Court thus addresses the question whether the district court properly denied Campbell's motion to dissolve the restraining order. A federal court should abstain in two situations. First, the court should allow the case to proceed in state court if the value of the limitation fund, which represents the value of the vessel and its cargo, exceeds the aggregate of the total number of claims filed against the owner. *Lake Tankers Corp. v. Henn*, 354 U.S. 147, 152-154; *Dammers*, 836 F.2d at 755. That situation is not presented here. Second, where a single claimant brings an action against the shipowner seeking damages in excess of the value of the limitation fund, the district court should return the case to state court so long as the claimant makes stipulations adequate to protect the shipowner's rights under the Limitation Act. *Ex Parte Green*, 286 U.S. at 438-440; *Langnes*, 282 U.S. at 540-544. Specifically, the claimant must waive any claim of res judicata from the state court proceedings relevant to the issue of limited liability and concede the exclusive jurisdiction of the federal courts to determine all issues relating to limitation of liability. *Port Arthur*, 42 F.3d at 316; *Gorman*, 2 F.3d at 524; *Dammers*, 836 F.2d at 755 (all citing additional authority).

Campbell's motion to dissolve the restraining order fell squarely within the second category, which is the abstention rule that has its roots in *Langnes*. First, Campbell was the sole claimant. In its order denying the motion, the district court stated that there existed the possibility of additional claims for contribution or indemnity. However, the mere possibility of such claims is not enough to preclude state court adjudication, particularly

where the nature of the accident belies the possibility of multiple claims and where no other claims were filed in the district court after it had notified potential claimants to do so pursuant to Fed.R.Civ.P. Supp. R. F(4). *Langnes*, 282 U.S. at 540. Nothing in the record convinces us that additional claims will likely be filed in state court. Further, the claim for damages by Commercial Union against Campbell does not create a multiple claims situation. Only multiple claims against the *shipowner* necessitate federal court adjudication. See, *e.g.*, *Gorman*, 2 F.3d at 525.

Second, Campbell provided adequate stipulations in his motion to dissolve the restraining order. It stated,

> That claimant waives any claim of res judicata relevant to the issue of limited liability based on any judgment obtained in state court; and stipulates to petitioner's right to litigate issues relating to the limitation in this limitation proceeding. (Motion to Dissolve ¶ 8).

The stipulations clearly waive res judicata and acknowledge the ultimate right of McCarthy to have limitation issues decided in federal court.

Finally, the district court correctly noted that Campbell's failure to expressly stipulate to the value of the limitation fund did not preclude it from dissolving the restraining order. Authority exists that such a stipulation must be made. See *Dammers*, 836 F.2d at 758-759; *Jefferson Barracks*, 763 F.2d at 1010 (both citing Grant Gilmore & Charles L. Black, *The Law of Admiralty*, at 871 (2d ed. 1975)). However, in light of the Supplemental Rules to the Federal Rules of Civil Procedure, the Sixth Circuit has noted that it is no longer necessary for a claimant to expressly stipulate to the value of the limitation fund.

Midland Enterprises, 886 F.2d at 816-818. Rule F(7) of the Supplemental Rules provides a detailed procedure for a claimant to challenge the value placed on the vessel and its cargo by the shipowner. Thus where a claimant fails to challenge the amount of the limitation fund via Rule F(7) he is presumed to accept it. We agree with the Sixth Circuit that the claimant need only stipulate to the district court's authority to determine the value of the limitation fund, which Campbell has done. Campbell never contested the value of the limitation fund in the district court, except by way of a general denial in his answer to McCarthy's petition, and he certainly never made a Rule F(7) motion. For the foregoing reasons, the district court abused its discretion in denying Campbell's motion to dissolve the restraining order.

IV.

In summary, the district court's memorandum and order are reversed insofar as they hold that Campbell's complaint was untimely filed under 46 U.S.C. § 185. The remainder of the memorandum and order is vacated and will therefore be of no authority in any future proceeding. The district court's order denying Campbell's motion to dissolve the restraining order is reversed. Pursuant to *Langnes* and *Ex parte Green, supra*, the district court shall retain jurisdiction over the right of McCarthy to a limited liability.

We pause briefly to address the apparent anomaly of vacating the district court's findings that relate to the question of whether McCarthy is entitled to a limitation of liability – in particular, the findings that McCarthy

failed to prove lack of privity or knowledge under 46 U.S.C. § 183(a) and that McCarthy failed to prove the value of the vessel and its cargo. Depending on how the state court case proceeds on the question of liability, the district court may once again be called upon to determine these issues. We vacate the findings for two reasons. First, deciding the questions may be unnecessary. Admiralty procedures contemplate that the district court will permit the liability determination to be made prior to the limitation action; as *Langnes* states, the district court only retains jurisdiction for the possibility that the right of the shipowner to limit his liability comes into question. 282 U.S. at 541-542.[2] Frequently, it will not – the shipowner may win the liability action, he may be found liable for an amount less than the value of the vessel and its cargo, or the claimant might not contest the shipowner's limitation right. Thus we decline to decide the limitation questions for the same reason that the district court should have done so.

Second, the course of proceedings in the district court reveals a degree of unreliability such that, at best, a remand would be in order on the limitation questions.

---

[2] We have uncovered only one case in which the district court was held to have properly determined the limitation of liability issues prior to resolution of the liability issues. See *In re Double D Dredging Co.*, 467 F.2d 468 (5th Cir.1972). That case was unique, however, because the limitation action was consolidated with the claimant's Jones Act suit, both in federal court. In the typical case, the district court should await a determination of liability before proceeding with any remaining limitation of liability issues. See *Ohio River Co. v. Carrillo*, 754 F.2d 236 (7th Cir.1985).

The district court dismissed McCarthy's petition as untimely filed. Once it had done that, its other findings were gratuitous. Findings made by a court on matters that it has first admitted are not properly before the court smack of unreliability, and an appellate court that disagrees with the conclusion that the matters were not properly before the lower court ought to remand for a redetermination of findings made contingent on that conclusion. The law is replete with examples of the unreliability of unnecessary findings, such as the law of collateral estoppel and the principle that dicta is not binding in subsequent cases. Vacatur in this case is equivalent to a remand pending resolution of the liability issues in Campbell's state court action.

The case is therefore VACATED in part, REVERSED in part, and REMANDED for proceedings consistent with this opinion. The parties shall bear their own costs in this Court.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: May 3, 1996

BEFORE:

Honorable WALTER J. CUMMINGS, Circuit Judge

Honorable FRANK H. EASTERBROOK, Circuit Judge

Honorable ILANA DIAMOND ROVNER, Circuit Judge

No. 95-2880

IN THE MATTER OF THE COMPLAINT OF:

MCCARTHY BROTHERS COMPANY/CLARK BRIDGE, as Owner Pro Hac Vice of Barge #AEB1 for Exoneration from or Limitation of Liability,
Petitioner – Appellant

Appeal from the United States District Court for the Southern District of Illinois, East St. Louis Division No. 94 C 72, Paul E. Riley, Judge

The judgment of the District Court is VACATED in part, REVERSED in part, and REMANDED. The parties shall bear their own costs in this court. The above is in accordance with the decision of this court entered on this date.

(1061-110393)

UNITED STATES DISTRICT COURT

Southern DISTRICT OF Illinois

In the Matter of the Complaint of McCARTHY BROTHERS, COMPANY CLARK BRIDGE, as Owner Pro Hac Vice of Barge #AEB1 for Exoneration from XX or Limitation of Liability.

JUDGMENT IN A CIVIL CASE

(Filed Jul. 18, 1995)

CASE NUMBER: 94-72-PER

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this cause is hereby REMANDED back to the Circuit Court of Madison County, Illinois, pursuant to an order of this Court filed July 18, 1995.

July 18, 1995
Date

STUART J. O'HARE
Clerk

APPROVED

/s/ Paul E. Riley
PAUL E. RILEY
United States
District Judge

/s/ Annie McGraw
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

In the Matter of the Complaint of McCARTHY BROTHERS COMPANY CLARK BRIDGE, as Owner Pro Hac Vice of Barge #AEB1 for Exoneration from or Limited of Liability.	))))))	**NO: 94-CV-0072-PER**

MEMORANDUM AND ORDER

(Filed Jul. 18, 1995)

RILEY, District Judge:

I. Introduction

Claimant Gary Campbell ("Claimant" or "Campbell") filed a complaint in the Circuit Court of Madison County, Illinois, against McCarthy Brothers Company, alleging Jones Act negligence, unseaworthiness, and maintenance and cure on August 31, 1993. Campbell claimed that on October 29, 1991, he slipped and fell while working as an ironworker on a barge used on the Clark Bridge project near Alton, Illinois.

On January 27, 1994, McCarthy Brothers Company/ Clark Bridge ("Petitioner" or "MBC") filed an action for limitation of, or exoneration from, liability pursuant to **46 U.S.C. §§ 181-195**, inclusive (Doc. 1). On March 13, 1995, this Court held a bench trial on Petitioner's action. Having considered the pleadings, the testimony of witnesses, and the documents in evidence, pursuant to **Federal Rules of Civil Procedure 52(a)**, the Court makes the following findings of fact and conclusions of law.

II. Findings of Fact

Campbell, a member of Ironworkers Local No. 392, East St. Louis, Illinois, was hired by MBC on September 12, 1991, as an ironworker in the construction of the Clark Bridge near Alton, Illinois. On October 29, 1991, Campbell was working on Barge #AEB1, which was afloat on the Mississippi River. Campbell's work consisted of fastening iron rods together with wire to fashion a framework ("rebar cage") which was installed in the riverbed to support and shape concrete.

The ironworkers wore a reel on their belts to store wire for ready use. Campbell had exhausted his supply of wire and walked to a different part of the barge to replenish his reel. As Campbell returned to his work area, he was momentarily distracted as he checked his reel, stepped on a piece of scrap wood near a pile of welding chips, scrap tie wire, scrap wood, and wood chips, and fell back against a rebar cage.

Campbell experienced lower back pain as a result of this fall which worsened and impeded his return to work. He suffered serious injuries to his lower back. The parties stipulated at the time of trial that Commercial Union had paid Campbell $32,061.06 for medical and related expenses, plus temporary total disability benefits of $48,817.81.

Several barges served different purposes during the Clark Bridge construction. There was at least a crane barge, a carpenters' barge, and an ironworkers' barge (#AEB1). Petitioner chartered Barge #AEB1 from the American Boat Company (Bareboat Charter Party Agreement) as a "vessel" in operating condition afloat at or

near Alton, Illinois, to transport materials from the riverbank to locations in the river for installation on the construction of Clark Bridge.

Barge #AEB1 was crewed by two different union crafts – ironworkers and laborers. The purpose of this barge was to transport iron rebar, pre-tie it, and install it in the river. Ironworkers like Campbell spent all of their time working on the barge and were essential to accomplishing the barge's mission. The ironworkers did not leave the barge when it moved and ate their meals on the barge. Campbell stated that Barge #AEB1 moved as often as several times a day, two or three times a week. Ironworkers were issued life jackets, and should one of the workers on the barge have fallen overboard, a johnboat was available to retrieve said individual.

One laborer was assigned to each barge to serve as a deckhand (with associated maritime duties) and also to exclusively clean up the work areas and walkways on the barge. Barge #AEB1 generated a considerable amount of debris and scrap material. Although the assigned laborer, Jim Sweezey, was a conscientious worker, it was not possible for him to keep up with the waste material generated by the project.

Another laborer, Albert Green, was instructed by his foreman to assist Sweezey on October 29, 1991, on the ironworkers' barge. Green was an objective witness who provided the most credible testimony during the trial. Green maintained that the amount of waste generated by the ongoing ironwork required *at least* two deckhands to keep the refuse cleared away. He witnessed Campbell's

fall but was unable to tell precisely what tripped Campbell because there was so much debris in the walkway. This was consistent with Campbell's testimony that there were piles of scrap material "everywhere" on the barge. One of McCarthy's Brothers' work rules required that "[a]ll work areas, walk ways, aisles, fire exits and stairs shall be free from material, scrap and debris."

Although Don Brewster (Campbell's foreman) testified that Campbell fell into him, both Campbell and Albert Green denied that Campbell had any physical contact with Brewster. In addition, Petitioner's accident report (Claimant's Exhibit 17) indicated that Campbell fell against a rebar cage, completely omitting any mention of contact with Brewster.

Ralph Salamie, McCarthy Brothers' project manager for the Clark Bridge construction project, testified that he was on the job site, including the ironworkers' barge, daily. He was aware that deckhands had other duties besides clean up, such as working with the tugboat and handling lines. Salamie admitted that only one laborer was assigned to work on the ironworkers' barge as a deckhand and that he was aware of conditions on the barge, "whatever they were," at the time of Campbell's fall.

Petitioner did not call as witnesses Mr. Sweezey or Mr. Robert Andrews (the safety manager who investigated the injury) at trial. Petitioner did not introduce logs of the M/V Miss Jan, which was the tug assigned to move Barge #AEB1. Also, despite testimony that Brewster had at least two cameras on the job site, Petitioner failed to introduce any photographs of the scene of the injury

taken on the day of the injury or even close to the day of the injury.

III. Conclusions of Law

A. Seaman Status under the Jones Act

In order to establish Campbell's status as a seaman under the Jones Act, three conditions must be met: First, that Barge #AEB1 was a vessel at the time of Campbell's injury; second, that this barge was in navigation at the time of Campbell's injury; and third, that Campbell was a member of the crew of the barge.

The first condition is met. Barge #AEB1 was a vessel as evidenced by the Charter Agreement. Further, it is undisputed that the vessel was used to transport iron rebar over the water of the Mississippi River. Congress has defined a vessel to include, "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3.

The Supreme Court has held that: "[A] barge is a vessel within the meaning of the [Jones] Act even when it has no motive power of its own since it is a means of transportation on water." ***Norton v. Warner Company,* 321 U.S. 565, 571 (1944).** The Seventh Circuit affirmed this view in ***Johnson v. John F. Beasley Construction Company,* 742 F.2d 1054, 1063 (7th Cir. 1984),** that "[a]ny floating structure, including those designed for special purposes, is a – vessel – capable of having a maritime – crew so long as the structure at some time serves as a means of transportation on water." Furthermore, "[a]bout

the only floating structures unable to act as a means of transportation on water are offshore drilling platforms [citations omitted] and dry docks or floating docks that are regarded as nothing more than extensions of land [citations omitted]." ***Id.*, Note 8.**

Petitioner argued that Barge #AEB1 was not a vessel based on testimony that it was used as a stationary platform most of the time. The Seventh Circuit specifically rejected this argument and simultaneously reaffirmed the vessel analysis of ***Johnson*** in ***Great Lakes Dredge & Dock Company v. City of Chicago*, 3 F.3d 225, 229 (7th Cir. 1993), *aff'd* 115 S. Ct. 1043.**

Second, Barge #AEB1 was in navigation at the time of Campbell's injury. A vessel is "in navigation" while moored in navigable waters. ***Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370, 373 (1957).** The Seventh Circuit has interpreted this rule to mean that: "the injured employee does not cease becoming a member of the crew if the vessel is docked or anchored at the moment of injury. As properly construed, the 'in navigation' requirement is used in the broad sense and is not strictly confined to the actual navigating or movement of the vessel, but instead means that the vessel is engaged as an instrument of commerce or transportation on water [citation omitted]. Indeed, so long as the vessel is upon navigable waters, an injured Jones Act seaman may recover for injuries suffered while on the wharf." ***Johnson v. John F. Beasley Construction Company*, 742 F.2d at 1063-64.**

Thus, because the barge was used to transport iron rebar during the construction work and because the barge

never left navigable waters, the vessel was "in navigation" for purposes of the Jones Act.

Third, Campbell was a member of the crew of the barge. Since the rejection of the "aide in navigation" test by ***Wilander,*** the standard for "seaman status is employment – related connection to a vessel in navigation." ***McDermott International Inc. v. Wilander,*** **498 U.S. 337 (1991).** This standard requires that a seaman contribute to the function of the vessel or to the accomplishment of its mission; aiding in the navigation of the vessel is specifically *not* required. ***Wilander,*** **498 U.S. at 355.**

Campbell worked exclusively on board Barge #AEB1 for forty seven days at the time of his injury, thereby satisfying the permanent connection element. He contributed to the function of the vessel or accomplishment of its mission. Campbell's ironwork was "essential" to performing the installation of rebar in the river, which was the barge's mission. Accordingly, Campbell was a member of the crew of the vessel (Barge #AEB1) and, therefore, was a seaman within the meaning of the Jones Act.

B. Exoneration Analysis

There are two issues under exoneration requiring analysis: First, whether the Petitioner is liable for Claimant's injuries; and second, whether the Claimant was contributorily negligent.

Turning to the issue of Petitioner's liability, this Court finds that there was sufficient evidence to find Petitioner liable for Claimant's injuries due to negligence

and unseaworthiness. A violation of a safety rule is evidence of negligence on the part of an employer because it tends to establish both the employer's knowledge of the danger, as well as the foreseeability of injury. ***Coleman v. Gulf, Mobile and Ohio R.R. Co.*, 17 Ill.App.2d 220, 149 N.E.2d 656, 658 (1958).** The failure to provide a reasonably safe place to work is negligence under the Jones Act. ***Gold v. Groves*, 182 F.2d 767, 770 (3rd Cir. 1950).** The failure to furnish a reasonably safe walkway also renders the vessel unseaworthy. ***Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960).**

Rule 20 of Petitioner's safety rules required that work areas, *walk ways*, aisles, fire exits and stairs should be kept free from material, scrap and debris [emphasis added]. Here, Petitioner failed to provide a reasonably safe or suitable walkway for Campbell. Both Campbell and Green provided testimony that the walkways on the barge were littered with debris and scrap wood. Campbell's fall occurred when he tripped over a piece of scrap wood in a walkway.

The accident report confirmed that the area where Campbell was walking was "heavily traveled." Petitioner's duty to insure a safe walkway was correspondingly increased since it was reasonably foreseeable that the walkways would be traveled repeatedly rather than rarely.

Petitioner failed to call at trial Sweezey (deckhand assigned to the barge) or Robert Andrews (safety manager who investigated the injury) to rebut this testimony. The failure of Petitioner to set forth relevant material evidence raises an adverse inference that such employees

if called would have testified adversely to Petitioner, and justifies the Court in accepting the testimony of Campbell and Green. ***Southern Cross S.S. Co. v. Firipis*, 285 F.2d 651, 659 (4th Cir. 1960).**

Ralph Salamie, Petitioner's project manager, testified that he was on the ironworkers' barge on a daily or nearly daily basis. He was aware of the conditions on the barge, "whatever they were." For the above reasons, this Court finds that the Petitioner was liable for Claimant's injuries based on negligence and unseaworthiness.

There remains the matter of whether the Claimant was contributorily negligent. Campbell was walking near a scrap pile and looking down at his wire reel, thus he did not see the scrap pile. He stepped on a piece of scrap wood and fell back against the rebar cage. Petitioner argued that Campbell's distraction with the wire reel constituted contributory negligence.

Campbell was not responsible for cleaning the walkways. This included small pieces of scrap wood which would not be used for template construction. Petitioner's foreman, Brewster, admitted that Campbell had the right to expect that the walkways would not be cluttered with debris. An employee has the right to rely on the work rules as the appropriate standard of conduct. ***Kurn v. Stanfield*, 111 F.2d 469, 474 (8th Cir. 1940) (F.E.L.A. case).** Claimant was entitled to rely on Petitioner's work rule 20 which required the walkways to be clean and free of debris and scrap. Thus, there was no violation of the work rule by Claimant and there was a clear violation of that rule by Petitioner.

Claimant's attention was diverted by his wire reel which the evidence established was equipment necessary to perform his duties. Claimant used due care under the circumstances and was not required to keep his eyes "glued to the floor." Campbell had the right to assume that the walkway would be reasonably fit for its intended use. Therefore, the failure to observe and avoid the scrap wood does not constitute contributory negligence. ***Honea v. Matson Navigation Co.*, 336 F. Supp. 793, 796 (N.D. Cal. 1972).**

C. MBC's Actual Knowledge/Privity with Unseaworthy Condition

The Seventh Circuit has explicitly stated that: "[i]n limitation proceedings, the ultimate burden of proving lack of privity or knowledge is on the shipowner. ***Matter of Oil Spill by The Amoco Cadiz Off Coast of France on March 16, 1978*, 954 F.2d 1279, 1303 (7th Cir. 1992).** The Court of Appeals delineated the scope of "privity or knowledge":

> Privity or knowledge is not tantamount to actual knowledge or direct causation. All that is needed to deny limitation is that the shipowner, "by prior action or inaction set[s] into motion a chain of circumstances which may be a contributing cause even though not the immediate or proximate cause of a casualty. . . . " ***Tug Ocean Prince, Inc. v. United States*, 584 F.2d 1151, 1158 (2nd Cir. 1978), *cert. denied*, 440 U.S. 959 (1979).** The recent judicial trend has been to enlarge the scope of activities within the "privity or knowledge" of the shipowner, including imputing to

> corporations knowledge or privity of lower-level employees [citations omitted]; requiring shipowners to exercise an ever-increasing degree of supervision and inspection, [citations omitted]; imposing a heavy burden on shipowners to prove their lack of privity or knowledge, [citations omitted]; rendering the shipowner's duty to ensure the seaworthiness of the ship nondelegable, [citations omitted]; and narrowing the group of potential defendants eligible for exoneration under the Act, [citations omitted]. *Matter of Oil Spill by the Amoco Cadiz*, **954 F.2d at 1303-04.**

Knowledge of a corporate manager vested with discretionary authority defeats a corporate limitation action. ***Great Lakes Dredge & Dock Company v. City of Chicago*, 3 F.3d 225, 231 (7th Cir. 1993).** Ralph Salamie testified on behalf of the Petitioner that he was MBC's project manager for the overall bridge construction project. Salamie was not a lower-level employee handling ministerial matters. No expansion of traditional concepts is necessary to impute his knowledge to the corporation.

Salamie was on the ironworkers' barge on a daily, or nearly daily, basis and was aware of the conditions on the barge, "whatever they were." The only disinterested witness, Albert Green, testified that scrap and debris were a constant problem on the barge. The accident report noted the presence of a pile of debris in the walkway at the time of Campbell's accident. In light of these facts, it is clear that a managerial employee of the Petitioner knew that the work in progress experienced an ongoing problem by generating debris and scrap in the working areas and walkways of Barge #AEB1. Petitioner's manager thus had

actual knowledge that Petitioner was negligently violating its own safety rule 20, which also rendered the vessel unseaworthy. These facts preclude MBC from sustaining its burden of proof of lack of privity or knowledge. ***See Matter of Oil Spill by the Amoco Cadiz,* 954 F.2d at 1304.**

D. Limitation of Liability Via Establishing Vessel Value

The Petitioner has the burden of establishing not only the value of the vessel but also of its pending freight. "The privilege of limiting liability is granted the owner of an offending vessel on condition that he surrender the value of his interest in 'such vessel, and her freight then pending' [citation]." ***In re W.E. Hedger Co.,* 59 F.2d 982 (2nd Cir. 1932).** The petitioner has the burden in a limitation proceeding of demonstrating compliance with conditions entitling him to limit liability. Petitioner must show the value of the interest in the vessel and her pending freight. ***Hedger,* 59 F.2d at 983.**

The parties stipulated that MBC's marine surveyor, Peter Marrow, was an expert qualified to offer an opinion on the value of Barge #AEB1 and that Mr. Marrow would testify that the fair market value of Barge #AEB1 was $75,000 on or about October 29, 1991. This opinion did not address the value of the pending freight nor did it include other items which must be included.

Petitioner claimed that the value of the pending freight was zero dollars, predicated on Salamie's affidavit that there was no freight pending at the time of the injury. This opinion is incorrect. First, pending freight "refers to the compensation received for carriage of goods and not

the goods themselves. 'Pending freight' is the total earnings for the voyage, both prepaid and uncollected." ***Complaint of Caribbean Sea Transport, Ltd.*, 748 F.2d 622, 626 (11th Cir. 1984), *amended on den. of rehearing*, 753 F.2d 948 (1985).** "[T]he freight to be surrendered is the gross freight earned without deduction of the expense of earning it." ***Hedger*, 59 F.2d at 983.**

MBC earned money by transporting iron rebar for installation in the river. Whether Petitioner was paid separately for each leg is immaterial. ***Caribbean Sea Transport*, 748 F.2d at 626.** Salamie admitted that the barge may have had up to 100 tons of steel as cargo on board. Campbell pre-tied rebar and fell into a rebar cage the day of his accident. Rebar is cargo. Thus, there was cargo on board for which freight, either prepaid or to be collected, was pending. The failure to adduce evidence of value precludes Petitioner from sustaining its burden of proof as to value.

Second, Petitioner failed to provide evidence of the value of various items present on the barge at the time of the injury, which are required to be included in the value of the vessel. The value of appurtenances and stores "must be included in the appraisal but not the value of spare parts on shore." ***In re Waterman S.S. Corp.*, 794 F. Supp. 601, 605-06 (E.D. La. 1992).** Petitioner offered no evidence to base a value on the various pieces of equipment, generators, trailers, lunch shacks, and other items which the testimony established to be on the barge. Combining the value of the various shacks, generators, tools and other equipment on board at the time of the incident, it is conceivable that the value of the vessel greatly exceeded the amount posed by Petitioner's appraiser.

E. Petitioner Had Burden of Proving Complaint Was Timely Filed

The statute (46 U.S.C. §185) provides that the action must be filed within six months of the serving of " . . . written notice of claim." The statute does not self-define "written notice of claim." The kind of writing sufficient to trigger operation of the statute is vague. ***Complaint of Bayview Charter Boats, Inc.,*** **692 F. Supp. 1480, 1484 (E.D. N.Y. 1988).** Nevertheless, it is settled that letters sent by claimants to vessel owners may constitute notice of claim. ***Doxsee Sea Clam Co., Inc. v. Brown,*** **13 F.3d 550, 554 (2nd Cir. 1958).** A lien letter constitutes sufficient notice for the commencement of the statutory time limit. ***Doxsee Sea Clam Co., Inc.,*** **13 F.3d 550 (2nd Cir. 1994);** ***In re Allen N. Spooner & Sons, Inc.,*** **253 F.2d 584, 586 (2nd Cir. 1958).** A letter which informs the vessel " . . . owner of an incident occurring on a particular date and [which] states the possibility that the injured party will hold the owner liable for injuries sustained in connection with that incident . . . constitutes written notice of claim within the meaning of Section 185." ***Bayview,*** **692 F. Supp. at 1485, 86.**

In the case at bar, Claimant's counsel served Petitioner with a notice of claim on January 29, 1993. That notice charged Petitioner with knowledge that Campbell sustained injuries on or about October 29, 1991, " . . . for which he claims you are responsible." The letter also requested that the claim be forwarded to the Petitioner's insurance carrier. These circumstances are sufficient for the letter to trigger the six-month limitation period for the bringing of this action.

Spooner, **692 F. Supp. at 1486,** held that because a letter informed the vessel owner (1) of the incident, and (2) of the possibility that the owner would be held liable for the claimant's injuries, the action for limitation of liability must be dismissed as untimely. In the case at bar, the lien letter meets both requirements for "written notice of claim" within the meaning of Section 185. It informs the vessel owner of the incident and indicates the intent to hold the owner liable for the injuries. Written notice of claim was received by MBC on January 29, 1993. The instant action was not commenced until nearly a full year later on January 27, 1994. Therefore, Claimant is entitled as a matter of law to a judgment dismissing the complaint as untimely.

This Court notes that an allegation of a specific amount sought is not required to be in the notice of claim; all that is required " . . . is a reasonable possibility that the claims would exceed the value of the ship." ***Complaint of Morania Barge No. 190, Inc.,* 690 F.2d 32, 34 (2nd Cir. 1982).** Under *Doxsee,* **13 F.3d at 555,** the burden caused by uncertainty as to the amount of damages is put squarely on the vessel owner. In the instant case, the vessel owner failed to resolve any claimed ambiguity. Thus, the six-month period was not tolled. Petitioner failed to seek to clarify the amount of damages sought.

Furthermore, "[l]imitation of liability is created solely by statutory enactment." ***Petition of Southern Steamship Company,* 132 F. Supp. 316, 319 (D. Del. 1955).** Because the limitations period is set forth in the statute which creates the right to sue, that period is a component of Petitioner's *prima facie* case rather than an affirmative defense. *Scarborough v. Atlantic Coast Line R. Co.,* **178**

F.2d 253 (4th Cir. 1949). "Filing a complaint within the prescribed period is a condition precedent to recovery and the cause of action is extinguished after the running of the period." ***Osbourne v. United States*, 164 F.2d 767, 768 (2nd Cir. 1947).** Because filing within the time limit is an element of Petitioner's *prima facie* case, the opposing party cannot waive the time limit. ***Osbourne*, 164 F.2d at 768.** Thus, the Claimant need not specifically plead the time limit under Rule 8(c), **FEDERAL RULES OF CIVIL PROCEDURE.** ***Goodwin v. Townsend*, 197 F.2d 970, 971 (3rd Cir. 1952); *accord* [citations].**

IV. Summary

The letter served on Petitioner on January 29, 1993, constitutes a written notice of claim sufficient to trigger the six-month limitation period set forth in **46 U.S.C. § 185.** Because the complaint for limitation and exoneration was not filed until January 27, 1994, it was untimely and is hereby **DISMISSED.**

This case is hereby **REMANDED** back to the Circuit Court of Madison County which shall determine the issue of the amount of damages consistent with the terms of this Order. The Clerk of the Court is instructed to **REMAND** this case to the Circuit Court of Madison County, Illinois.

IT IS SO ORDERED.

DATED this 18th day of July, 1995.

/s/ Paul E. Riley
PAUL E. RILEY
United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

In the Matter of the Complaint of McCARTHY BROTHERS COMPANY CLARK BRIDGE, as Owner Pro Hac Vice of Barge #AEB1 for Exoneration from or Limitation of Liability.	))))))	**NO: 94-CV-72**

MEMORANDUM AND ORDER

RILEY, District Judge:

Introduction

(Filed Mar. 2, 1995)

Now before the Court are two motions for summary judgment. The first motion is Claimant Gary Campbell's Motion for Summary Judgment (Doc. 34). The second motion is McCarthy Brothers Company/Clark Bridge's Motion for Summary Judgment (Doc. 38). All memoranda, responses and replies to both motions are now properly before the Court. Furthermore, this Court heard oral argument on all pending motions during a final pretrial conference in this matter on December 8, 1994.

Facts

Claimant, Gary Campbell (hereafter "Campbell"), started work for McCarthy Brothers Company (hereafter "MBC") as a union ironworker on the Clark Bridge project on September 12, 1991. His job was to tie pieces of rebar together. This work was performed on the deck of Barge #AEB1.

MBC was the owner pro hac vice of Barge #AEB1 pursuant to a written bareboat charter party agreement dated July 8, 1991, by and between the American Boat Company and MBC. MBC had control over the use and movement of this barge.

On October 29, 1991, Barge #AEB1 was tied off on the upper Mississippi River near Alton, Illinois, and was being used as a work platform on the Clark Bridge project. While working on the barge that day, Campbell slipped on a piece of scrap wood and/or rebar tie injuring his back.

Plaintiff MBC/Clark Bridge, as owner hac vice of Barge #AEB1, filed a Complaint for Exoneration from or Limitation of Liability (Doc. 1). Statutory authority for this action for limitation of a vessel owner's liability is found in **46 U.S.C. §§ 181 through 195.** "[Doc. 1] is an admiralty and maritime claim within the meaning of Rule 9(h) Federal Rules of Civil Procedure and for the purposes of Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims." (Doc. 1, p.1)

Two claims have been filed against the Plaintiff. The first is by Commercial Union Insurance Company (hereafter "CU") in its claim for damages (Doc. 9). CU has filed a lien for workers' compensation benefits paid out to Gary Campbell pursuant to **820 ILCS 305/5(b)** of the Illinois Workers' Compensation Act. The second claim was filed by Campbell, who seeks damages for this injury (Doc. 11). Campbell asserts that MBC was at fault, that there was no contributory fault on this part and that his damages are in excess of SEVENTY FIVE THOUSAND DOLLARS ($75,000.00).

The Standard for Summary Judgment

Summary judgment is proper where the pleadings and affidavits, if any, "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." **Federal Rules of Civil Procedure 56(c).** The movant bears the burden of establishing the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. ***Yorger v. Pittsburgh Corning Corp.*, 733 F.2d 1215, 1222 (7th Cir. 1984),** *citing* ***Rose v. Bridgeport Brass Company*, 487 F.2d 804, 808 (7th Cir. 1973).**

In reviewing a summary judgment motion, the Court does not determine the truth of the matters asserted but simply determines whether there is a genuine factual issue for trial. ***Harms v. Godinez*, 829 F. Supp. 259, 261 (N.D. Ill. 1993),** *citing* ***Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).** In making this determination, "the entire record is considered with all reasonable inferences drawn in favor of the non-movant and all factual disputes resolved in favor of the non-movant." ***Tregenza v. Great American Communications Company*, 823 F. Supp. 1409, 1411 (N.D. Ill. 1993).**[1]

Having examined both Motions for Summary Judgment in detail (Docs. 34, 38), this Court will first consider Document 38.

---

[1] Accord ***Matsushita Elec. Indus. Company, Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 488-89 (1986); *Jean v. Dugan*, 20 F.3d 255, 259 (7th Cir. 1994).**

Consideration of MBC/Clark Bridge's Motion for Summary Judgment (Doc. 38)

The parties do not dispute that the Mississippi River is a navigable waterway. MBC's major argument in its Motion for Summary Judgment (Doc. 38) is that Campbell does not qualify as a Jones Act seaman "because Barge #AEB1 was not a vessel in navigation for purposes of the Jones Act and Campbell, therefore, has no claim against MBC under the Jones Act or General Maritime Law" (Doc. 39, p.6). MBC argued that two prongs must be established to qualify Campbell as a Jones Act seaman. First, he must have had a more or less permanent connection with a vessel in navigation; second, the capacity in which he was employed or the duties which he performed must have contributed to the function of the vessel or the accomplishment of its mission. ***McDermott International, Inc. v. Wilander,* 498 U.S. 337, 355 (1991).** In footnote seven, page 6, Document 39, MBC correctly notes that:

> In ***Wilander,*** the court characterized the issue of "seaman" status as " . . . a mixed question of law and fact. When the underlying facts are established and the rule of law is undisputed, the issue is whether the facts meet the statutory standard. . . . " " . . . summary judgment or a directed verdict is mandated where the facts and the law will reasonably support only one conclusion." ***Id.* at 356.**

Having considered the record as a whole, this Court concludes that, because the status of the law is somewhat unsettled in the Seventh Circuit, and because genuine matters of material fact are at issue in the case at bar, summary judgment on behalf of MBC is unwarranted.

Campbell has set forth sufficient material facts under the law to provide a justiciable dispute, and MBC's Motion for Summary Judgment (Doc. 38) is hereby **DENIED.**

Campbell's Motion for Summary Judgment (Doc. 34)

Provided that the Jones Act applies to the case at bar, this Court would then reach the issue raised in Campbell's Motion for Summary Judgment (Doc. 34). Campbell argues that MBC failed to file the Complaint for Exoneration from or Limitation of Liability (Doc. 1) in a timely fashion. Campbell properly sets forth the standard for filing an exoneration as stated in **46 U.S.C. § 185:** The limitation period for the filing of the complaint is six months from the date a "claimant shall have given to or filed with such owner written notice of claim. . . . "

This Court notes that it may not have to reach this issue at all should Campbell fail on the merits of the case at bar. Therefore, this matter is not yet ripe for consideration. As such, this Court **DENIES** Campbell's Motion for Summary Judgment (Doc. 34) as premature.

Conclusion

MBC/Clark Bridge's Motion for Summary Judgment (Doc. 38) is hereby **DENIED.** Campbell's Motion for Summary Judgment (Doc. 34) is **DENIED.**

IT IS SO ORDERED.

DATED this 2nd day of March, 1995.

/s/ Paul E. Riley
PAUL E. RILEY
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

In the Matter of the Complaint of McCARTHY BROTHERS COMPANY/ CLARK BRIDGE, as Owner Pro Hac Vice of BARGE #AEB1 for Exoneration from or Limitation of Liability.	)))))))	**CAUSE NO. 94-CV-72-WDS** **(Filed Aug. 9, 1994)**

MEMORANDUM AND ORDER

STIEHL, District Judge:

Before the Court is claimant Gary Campbell's motion to dissolve the restraining order issued January 27, 1994, restraining claimants from filing, commencing or proceeding in any actions against petitioner McCarthy Brothers Company (MBC) and/or its affiliated and related companies or Barge #AEB1. The restraining order was issued with respect to an accident which occurred on October 29, 1991, when Campbell allegedly was injured while on Barge #AEB1. Campbell seeks to dissolve the restraining order and proceed with his cause of action filed in Madison County, Illinois.

The restraining order was issued by this Court pursuant to the Limitation of Liability Act, **46 U.S.C. § 181** ***et seq.*** The purpose of the Act is to ensure that liability for damages arising from incidents aboard vessels does not exceed the value of the vessel at fault, together with the value of her pending freight. ***Helena Marine Service, Inc. v. Sioux City,*** **54 F.2d 15, 17 (8th Cir. 1977),** ***cert. denied,*** **435 U.S. 1006 (1978),** ***quoting Lake Tankers Corp. v. Henn,***

354 U.S. 147, 150 (1957). When a shipowner seeks protection under the Act, the district court can issue a restraining order staying all other proceedings against the shipowner arising from the same accident. ***Complaint of Dammers & Vanderheide,* 836 F.2d 750, 755 (2d Cir. 1988).** Once MBC along with its surety, Continental Insurance Company, entered their "security for value" for the value of the barge and its pending freight, the restraining order because effective, halting the state court proceedings.

The courts have identified a limited number of circumstances when the shipowner's ability to limit liability is sufficiently protected, allowing the restraining order to be lifted. There are: (1) single or multiple claimants where the sum of the claims against the ship is less than the value of the ship and pending freight. ***Lake Tankers Corp.*, 354 U.S. 150-54,** and (2) a single claimant with a claim in excess of the limitation fund, but stipulations have been filed with the court that protect the shipowner's right to limit liability, ***Langes v. Green,* 282 U.S. 531, 540-44 (1931).** Campbell asserts that the latter case is present here.

I. "Savings-to-suitors" Clause

MBC asserts that because Campbell's case will involve issues of "seaman" status and a variety of federal statutes (the Jones Act, **46 U.S.C. § 688,** and the Longshore and Harbor Workers' Compensation Act), the case should be resolved in a federal court as opposed to state court.

Under the "savings-to-suitors" clause, **28 U.S.C. § 1333,** state courts are allowed to assume jurisdiction of

in personam causes of action based on general maritime law. However, the savings-to-suitors clause grants federal district courts original and exclusive jurisdiction over "[a]ny civil case of admiralty or maritime jurisdiction, savings to suitors in all cases all other remedies to which they are otherwise entitled." **28 U.S.C. § 1333(a).** State courts are therefore allowed to assume jurisdiction of *in personam* causes of action based on general maritime law, such as Campbell's Jones action. ***Madruga v. Superior Corp.*, 346 U.S. 556, 560-61 (1954).** The equity rule for retaining jurisdiction in order to dispose of the cause *en toto* does not ordinarily apply in admiralty proceedings. ***In re Taylor*, 82 F. Supp. 268, 270 (E.D. Mo. 1949).** Therefore, this Court will determine "whether there was negligence, whether it was without the privity and knowledge of the owner and if limitation is granted, how the [limitation] fund should be distributed," ***Dammers*, 836 F.2d at 755,** and Campbell will be allowed to proceed on this Jones action for damages in state court after liability limitation is determined.

II. Multiple Claim/Inadequate Fund Situation

MBC asserts that a multiple claim/inadequate fund situation exists. That is, if the order is lifted and other claims are filed against MBC, it may be subject to liability in excess of the limitation fund, thus controverting the purpose of the Limitation of Liability Act. MBC asserts that the possibility of Campbell refiling a claim against Massman Construction necessitates the continuance of the restraining order. Campbell, who earlier dismissed his claim against Massman, states that he has no intention

of refiling against Massman; therefore, this is not an obstacle to dissolving the order.

As long as there is a possibility that a ship owner could be held liable in excess of the limitation fund, the reasonable prospect of claims for indemnification or contribution constitutes a multiple claimant situation which necessitates that the restraining order remain in effect. ***Dammers,* 836 F.2d at 757.** If Campbell were to elect to refile his claim against Massman, Campbell could then seek to enforce a state court judgment against MBC up to the value of the limitation fund, and then attempt to recover the remaining amount of the judgment against the shipowner's co-defendant, Massman. If the parties have not filed protective stipulations with the admiralty court, the plaintiff would not be foreclosed from seeking recovery against MBC for contribution, even though MBC's liability had already been exhausted. It is precisely this kind of competition that the Act was designed to avoid. ***Gorman v. Cerasia,* 2 F.3d 519, 527 (3d Cir. 1993).**

In addition, Campbell admits that American Boat Company may be subject to liability in the state court proceeding, therefore, there exists the possibility of a contribution claim by American Boat against MBC. Campbell asserts that such a claim is derivative of his own and therefore would not create a multiple claim/inadequate fund situation. However, courts have held that indemnity and contribution claims do create this situation, thereby compromising the liability cap provided by the Limitation Liability Act. ***Dammers,* 836 F.2d at 756-57; *Gorman,* 2 F.3d at 527.**

The fact that these claims have not been filed within the requisite period in the limitation proceeding is not a fatal flaw to MBC's multiple claim/inadequate fund argument. The ability of trial courts to entertain motions to file late claims in liability proceedings if equity permits is widely recognized. ***See Helena Marine Serv., Inc.*, 564 F.2d at 18-19; *Texas Gulf Sulphur v. Blue Stack Towing Co.*, 313 F.2d 359, 362 (5th Cir. 1963); *Mayor v. New England Fish Co. of Oregon*, 136 F.2d 315, 316 (9th Cir. 1943).**

III. Stipulation Requirements

Even in multiple claim situations such as this, the restraining order may be lifted if the safeguards embodied in the stipulations are sufficient to satisfy the provisions and policies of the Act. ***Dammers*, 836 F.2d at 757.**

MBC asserts that Campbell has failed to establish in the record that satisfactory stipulations exist which would allow the Court to dissolve the restraining order. According to MBC, Campbell must include stipulation for value of the barge. In doing so, MBC relies on an Eighth Circuit decision that required the claimant to concede that the stipulation for value of the ship was sufficient. ***Jefferson Barracks Marine Serv., Inc. v. Casey*, 763 F.2d 1007, 1010 (8th Cir. 1985).**

This requirement has come under attack in other circuits. ***In re Complaint of Midland Enterprises, Inc.*, 886 F.2d 812, 817 (6th Cir. 1989),** the Sixth Circuit persuasively undercut the Eighth Circuit's rationale by noting that (1) the stipulation supposedly required by the Court was not, in fact, present and yet the Court directed

a dissolution of the restraining order, and (2) the Eighth Circuit's reliance on G. Gilmore and C. Black's ***The Law of Admiralty*** is questionable. The authors of the treatise relied heavily on Second Circuit precedents, but in ***Dammers,*** the Second Circuit reserved judgment as to whether the stipulation in question was actually required. **836 F.2d at 758 n.7.**

In order to put an end to this confusion, the Sixth Circuit proposed a method which appears to benefit both parties. The provisions of **Fed. R. Civ. P. Supp. F** detail procedures for the filing of complaints and responses in connection with limitation of liability actions. The provisions of **F(7)** set forth a specific procedure in which a claimant can challenge the value placed on the ship and its freight by the plaintiffs. The rule, in part, reads:

> (7) In sufficiency of Fund or Security.
>
> Any claimant may by motion demand that the funds deposited in court or the security given by the plaintiff be increased on the ground that they are less than the value of the plaintiff's interest in the vessel and pending freight. Thereupon the court shall cause due appraisement to be made of the value of the plaintiff's interest in the vessel and pending freight; and if the court finds that the deposit or security is either insufficient or excessive it shall order its increase or reduction.

Midland Enterprises, Inc., **886 F.2d at 817.18.**

If the claimant seeks to challenge the stipulation for value, he must either file a **F(7)** motion or accept the value placed on the vessel by MBC. In this way, the

claimant is forced into conceding a questionable stipulation for value, thus possibly unnecessarily limiting the recovery amount. Also, the shipowner will have the benefit of assigning a value to the vessel, as long as it is not subsequently challenged. This Court, recognizing the adequate protection that the Sixth Circuit's solution provides for all parties, adopts the F(7) alternative to resolve this conflict.

Despite the fact that Campbell need not stipulate his acceptance of the sufficiency of the amount of the stipulation for value of the barge, the remaining stipulations before the Court do not sufficiently protect MBC from liability in excess of the limitation fund. To be entitled to have the restraining order lifted, Campbell must stipulate that he will not seek to recover a judgment in excess of the fund which would expose the shipowner to increased liability. The Court notes that if the state court were to award any party attorney's fees, there would be no guarantee that the award would have priority over his claim. ***S & E Shipping Corp. v. Chesapeake & Ohio Ry.*, 678 F.2d 636, 646 (6th Cir. 1982).** The possibility of future contribution claims and the inadequate protection provided by the claimant's stipulations prevent the lifting of the restraining order.

Accordingly, the Court **DENIES** claimant Gary Campbell's motion to dissolve the restraining order.

IT IS SO ORDERED.

DATED: 4 August 1994

/s/ William D. Stiehl
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

In the Matter of the Complaint of McCARTHY BROTHERS COMPANY/CLARK BRIDGE, as Owner Pro Hac Vice of BARGE #AEB1 for Exoneration from or Limitation of Liability	)))))	Cause No. 94-72-WDS In Admiralty

ORDER APPROVING STIPULATION FOR COSTS AND SECURITY FOR VALUE AND DIRECTING ISSUES OF NOTICE, AND RESTRAINING SUITS

(Filed Jan. 27, 1994)

Plaintiff, McCarthy Brothers Company/Clark Bridge, having filed its Complaint for Exoneration From or Limitation of Liability in respect to any loss, damage, expense or injuries arising out of alleged injuries, accidents or casualties which allegedly occurred while Barge #AEB1 was tied off on the Upper Mississippi River near Alton, Illinois on or about October 29, 1991, all of which said alleged injuries, accidents and casualties are described in the Complaint in detail, and plaintiff having stated in the Complaint the facts and circumstances upon which the exoneration from or limitation of liability are claimed, and having therein prayed an appraisal of its interest in Barge #AEB1 and in the pending freight, if any, and for the amount of the appraised value or, pending the appraisal, a security for value; and the appraisal not yet having been had, and it appearing that the plaintiff desires, pending approval, to give a security for value and to obtain an order directing issuance of notice and to obtain a restraining order;

NOW, on the proceedings heretofore had herein and on reading plaintiff's Complaint, which has been duly filed in this proceeding, and from which it appears that the value of the plaintiff's interest in Barge #AEB1, including pending freight, immediately after the injuries, accidents and casualties described therein did not exceed the sum of $75,000.00;

AND, on reading and filing the security for value by plaintiff and by Continental Insurance Company, as surety, in the sum of $75,000.00 with interest, undertaking to pay into Court, upon entry of an order herein, the appraised value of the plaintiff's interest in Barge #AEB1 and in the pending freight, if any, the amount so fixed, or within said time to file in this Court a stipulation for value in the usual form and with proper surety in said amount, and that, pending such payment into Court or giving of a stipulation, said security for value shall stand as security in said proceeding;

IT IS HEREBY ORDERED that the security for value be, and hereby is, approved; and it is

FURTHER ORDERED that the execution and filing of the security for value shall be without prejudice to the due appraisal of the plaintiff's said interest under order of this Court, and that, on the filing of the report of the Commissioner to appraise and upon the determination by the Court of any exceptions thereto any party may have leave to apply to have the amount of the same security for value increased or diminished as the Court may direct; and it is

FURTHER ORDERED that a notice issue out of and under the seal of this Court against all persons claiming

damages for any and all losses, damages, expenses or injuries arising out of or occurring by reason of alleged injuries, accidents or casualties which allegedly occurred during the incident involving Barge #AEB1 on the Upper Mississippi River near Alton, Illinois, as more fully described in said Complaint, citing them to appear before this Court and to file their claims with the Clerk of this Court in writing and under oath and to serve copies thereof on Lewis, Rice & Fingersh and Andrew Rothschild, attorneys for plaintiff, on or before March 28, 1994, and directing that any such persons, or their personal representatives, claiming damages as aforesaid who shall desire to contest the right of plaintiff to exoneration from or the right to limitation of liability shall answer said Complaint and serve copies thereof on plaintiff's attorneys above named; and it is

FURTHER ORDERED that public notice shall be given by publication thereof in the *St. Louis Post-Dispatch*, Illinois Edition, as provided by Rule F(4) of the Supplemental Rules for Certain Admiralty and Maritime Claims of the United States Supreme Court and that the plaintiff, not later than the day of second publication shall mail also a copy of said public notice to every person known to have made any claims against Barge #AEB1 or against plaintiff arising out of the aforesaid alleged injuries, accidents or casualties during the same incident involving Barge #AEB1 as more fully described in plaintiff's Complaint; plaintiff shall also publish public notice once in the Waterways Journal; and it is

FURTHER ORDERED that the institution and prosecution of any suits, actions or legal proceedings of any

nature or description whatsoever in any court wheresoever, except in this proceeding for the limitation of liability, against the plaintiff or against the property of plaintiff, including Barge #AEB1, in respect of any claim arising out of or connected with any alleged injuries, accidents or casualties which occurred during the incident involving Barge #AEB1 while tied off on the Upper Mississippi River near Alton, Illinois, on or about October 29, 1991, are hereby stayed and restrained until the hearing and determination of this proceeding; and it is

FURTHER ORDERED that service of this Order as a restraining order within this district be made in the usual manner and in any other district of the United States by delivery by the Marshal of the United States for such district, of a certified copy of this order to the person or persons to be restrained, or to their respective attorneys or representatives.

27 January 1994
Date

/s/ William D Stiehl
United States
District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

In the Matter of the Complaint of McCARTHY BROTHERS COMPANY/CLARK BRIDGE, as Owner Pro Hac Vice of BARGE #AEB1 for Exoneration from or Limitation of Liability	))))))	Cause No. 94-72-WDS In Admiralty

COMPLAINT FOR EXONERATION FROM OR LIMITATION OF LIABILITY

COMES NOW plaintiff, McCarthy Brothers Company/Clark Bridge ("MBC"), as owner pro hac vice of Barge #AEB1, and for its Complaint for Exoneration from or Limitation of Liability, pursuant to 46 U.S.C. §181 *et seq.*, states:

1. This action arises under the laws of the United Sates [sic] providing for limitation of a vessel owner's liability (46 U.S.C. §§181-195 inclusive) and the various statutes, rules and regulations relating thereto. This is an admiralty and maritime claim within the meaning of Rule 9(h), Fed.R.Civ.P. and for the purposes of Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims.

2. At all times relevant hereto, plaintiff MBC, was a joint venture organized and existing under and by virtue of law. At all times relevant hereto, with its principal office in St. Louis County, Missouri, and was at all times relevant hereto the owner pro hac vice of Barge #AEB1 pursuant to a written bareboat charter party agreement dated July 8, 1991, by and between The American Boat Company and MBC. As a result of the bareboat charter party agreement, MBC had control over the use and

movement of Barge #AEB1. Barge #AEB1 was used as a work platform for iron workers in connection with the Clark Bridge project and on the infrequent occasions when Barge #AEB1 was moved, it was moved solely by McCarthy Brothers Company employees.

3. At all material times, Barge #AEB1 was a work platform of the dimensions of 210 feet by 54 feet, which was used on the navigable waters of the United States, and which at the time hereafter mentioned was tight, staunch, strong and seaworthy in all respects.

4. Prior to the time of the injury herein described, plaintiff used due diligence to make, and Barge #AEB1 was in fact, tight, staunch, strong, and in all respects seaworthy and fit for the use in which it was engaged.

5. On or about October 29, 1991, Barge #AEB1 was tied off on the Upper Mississippi River near Alton, Illinois, and was being used as a work platform in connection with the Clark Bridge project. While allegedly tying rebar together on Barge #AEB1, Gary Campbell, an iron worker, allegedly was injured when he slipped on a piece of scrap wood and/or rebar tye.

6. As a result of the foregoing, a claim under the Jones Act, 46 U.S.C. S668 *et seq.*, has been asserted against the plaintiff in the Circuit Court of Madison County, Illinois, captioned *Gary Campbell v. McCarthy Brothers and Massman Construction*, No. 93-L-899. Attorneys for plaintiff Gary Campbell are L. Thomas Lakin and Roy C. Dripps of The Lakin Law Firm, P.C., 251 Old St. Louis Road, P.O. Box 27, Wood River, Illinois 62095. Commercial Union Insurance Company also has a claim against

the limitation fund herein for a lien for worker's compensation benefits previously paid to Gary Campbell in connection with the aforesaid incident and the actual amount is unknown at this time. It is additionally anticipated that PCL Civil Contractors, Inc., Massman Construction and/or American Boat Company may assert claims for indemnity and/or contribution arising out of the aforesaid incident.

7. At the time of the alleged injury aforesaid, the value of Barge #AEB1, which was the value of the plaintiff's interest therein, did not exceed the sum of Seventy-Five Thousand Dollars ($75,000.00), and the plaintiff annexes hereto and makes a part hereof an affidavit as to the value of Barge #AEB1 immediately after the incident. Upon information and belief, plaintiff states that there are no liens upon Barge #AEB1 prior to or paramount to any liens which may have accrued by reason of the matters described in the Complaint.

8. At the time of the alleged injury aforesaid, Barge #AEB1 was without tow or freight. Thus, the value of the pending freight was zero dollars, and the plaintiff annexes hereto and makes a part hereof an affidavit as to the value of the pending freight of Barge #AEB1 recovered or recoverable.

9. The losses and damages allegedly resulting from the matters aforesaid were not caused or contributed to by any fault or neglect on the part of the plaintiff, nor of anyone for whose act plaintiff is or may be responsible, or on the part of Barge #AEB1.

10. The alleged losses and damages above referred to were done, occasioned and incurred without any fault

on the part of the plaintiff and without plaintiff's privity or knowledge. Plaintiff denies any liability for any claim of loss or damage occasioned by or resulting from the matters and happenings above recited and avers that plaintiff has a valid defense to all such claims. Plaintiff desires to contest plaintiff's liability for all such claims, and, therefore, show that plaintiff is entitled to exoneration from any liability. Should this Honorable Court, however, adjudge that plaintiff is in any way liable to any extent in the premises, then plaintiff claims the benefit of limitation of liability provided for in Section 4281, *et seq.* of the Revised Statutes of the United States,. as supplemented and amended (46 U.S.C. §§181-195). Subject to an appraisal of plaintiff's interest in Barge #AEB1 on a reference, should one be ordered, plaintiff offers and files herewith an *ad interim* stipulation, with approved corporate surety, for the payment into Court, whenever the Court shall so order, of the aggregate amount of plaintiff's interest in Barge #AEB1, plus her pending freight, if any, with interest at the rate of six percent (6%) per annum from the date of the security.

WHEREFORE, plaintiff prays:

A. That this Honorable Court enter an order approving the stipulation for costs in the amount of Two Hundred Fifty Dollars ($250.00) filed by plaintiff herein on which plaintiff is principal and Continental Insurance Company is the surety;

B. That this Honorable Court enter an order approving the security for value filed by plaintiff herein on which plaintiff is principal and Continental Insurance Company is surety in the amount of Seventy-Five Thousand Dollars

($75,000.00) with six percent (6%) per annum interest from the date of such stipulation, pending the appraisement of the Court of the amount of plaintiff's interest in Barge #AEB1 and its pending freight, if any as to quantum, form and surety;

C. That upon the filing of the foregoing, this Court issue an injunction restraining the commencement or prosecution of any and all actions, suits or legal proceedings of any kind against plaintiff or Barge #AEB1 or their underwriters or any other property owned by plaintiff arising out of the matters and happenings recited in the above and foregoing Complaint other than in these proceedings.

D. That the Court cause a notice to be issued to all persons, firms and corporations having or alleging to have claims by reason of the matters and happenings recited in the above and foregoing Complaint, admonishing them to appear and file their claims with the Clerk of this Honorable Court on or before the date to be fixed by this Court and as specified in the notice or be forever barred and permanently enjoined from making and filing any such claims; and to answer, all and singular, the premises of this Complaint;

E. That the Court adjudge the plaintiff and Barge #AEB1 not liable for any damages, demands or claims whatsoever in consequences of or arising out of or connected with the matters and happenings recited in the above and foregoing Complaint.

F. That, in the alternative, if this Court should adjudge the plaintiff is liable to any extent in the premises, the Court then adjudge

that the liability of the plaintiff be limited to the amount of its interest in Barge #AEB1 plus pending freight, if any, at the time of the alleged injury aforesaid; and in that event, the amount paid into the Court as representing the value of the plaintiff's interest in Barge #AEB1, and then pending freight, if any, shall be divided pro rata among any claimants having made due proof of their represented claims; and that a decree be entered discharging plaintiff and Barge #AEB1 from any liability in consequence of or arising out of or connected with the matters and happenings recited in the above and foregoing complaint;

G. That plaintiff may have such other and further relief in the premises as may be just and proper and this Court competent to grant.

LEWIS, RICE & FINGERSH

By Andrew Rothschild
Andrew Rothschild
Theodore H. Lucas

500 North Broadway, Ste. 2000
St. Louis, Missouri 63102
(314) 444-7600

Attorneys for Plaintiff
McCarthy Brothers Company

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

In the Matter of the Complaint of McCARTHY BROTHERS COMPANY/CLARK BRIDGE, as Owner Pro Hac Vice of BARGE #AEB1 for Exoneration from or Limitation of Liability	)	Cause No. _____ In Admiralty

AFFIDAVIT OF RALPH SALAMIE

STATE OF MISSOURI)
) SS.
COUNTY OF ST. LOUIS)

I, RALPH SALAMIE, being duly sworn, depose that I am an employee of McCarthy Brothers Company and the Project Manager of the Clark Bridge Project; that I am familiar with the pending freight on Barge #AEB1 on or about October 29, 1991, at or about the time of the alleged injury to Gary Campbell, while Barge #AEB1 was tied off near Alton, Illinois; and state that the vessel was without freight at that time and that the value of the pending freight was thus zero dollars, to the best of my knowledge, information and belief.

/s/ Ralph Salamie
RALPH SALAMIE

Subscribed and sworn to before me this 20th day of January, 1994.

/s/ Mary B Moore
Notary Public

My Commission Expires:
9/7/96

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

In the Matter of the Complaint of McCARTHY BROTHERS COMPANY/CLARK BRIDGE, as Owner Pro Hac Vice of BARGE #AEB1 for Exoneration from or Limitation of Liability	)	Cause No. _____ In Admiralty

AFFIDAVIT OF VALUE

STATE OF MISSOURI)
) SS.
COUNTY OF ST. LOUIS)

I, PETER C. MERRILL, being duly sworn, depose that I am an independent marine surveyor and am President of Merrill Marine Services, Inc., and I am familiar with and know the value of Barge #AEB1 immediately after the incident described in the foregoing Complaint, and state said value was Seventy-Five Thousand Dollars ($75,000.00) to the best of my knowledge, information and belief.

/s/ Peter C. Merrill
PETER C. MERRILL

Subscribed and sworn to before me this 24th day of JANUARY, 1994.

/s/ Illegible
Notary Public

My Commission Expires:
March 13, 1995

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

GARY CAMPBELL, Plaintiff,	)	No. 93-L-899
v.	)	
MCCARTHY BROTHERS and MASSMAN CONSTRUCTION, Defendants,	)	

COMPLAINT

COUNT I

(Jones Act)

(Filed Aug. 31, 1993)

Now comes the plaintiff, Gary Campbell, by his undersigned attorneys, and for his cause of action against the defendant. McCarthy Brothers states as follows:

1. On or about October 29, 1991, plaintiff, Gary Campbell was employed by defendant, McCarthy Brothers, working as a seaman on a barge which was afloat on the Mississippi River near Alton, Madison County, Illinois.

2. That at all times herein mentioned, the defendant was a corporation organized and existing by virtue of law, which then or thereafter assumed all liabilities of plaintiff's employment, and now is in the business of owning and/or operating towboats and barges upon the inland waterways of the United States, including the

Mississippi River and was and is doing business in the County [sic] Madison, State of Illinois.

3. That the plaintiff, as a seaman, brings suit against the defendant under the provisions of 46 U.S.C., Section 688 et seq., commonly called the Jones Act.

4. At said time and place, plaintiff Gary Campbell was severely injured when walking across the wet barge, slipped and fell on a pile of debris.

5. That the defendant at said time and place, by and through its agents, servants and employees was negligent in one or more of the following respects, to-wit:

(a) failed to provide plaintiff with a reasonably safe place in which to work;

(b) failed to provide plaintiff with adequate assistance in the performance of his duties;

(c) failed to warn plaintiff of the dangers in the area plaintiff was assigned to work when defendant knew, or in the ordinary care should have known that said dangers existed;

(d) failed to supervise the work being performed by plaintiff;

(e) failed to inspect the vessel and/or bare to see that if was not defective and/or unsafe;

6. As a direct and proximate result, in whole or in part of acts of negligence and/or omissions of defendant, plaintiff was injured in one or more of the following respects:

(a) he was made sick, sore, lame and disordered and suffered extensive injuries to his lower back;

(b) he has lost money from loss of wages in the past and is reasonably certain to lose wages in the future;

(c) he has suffered a loss of earning capacity;

(d) he has had pain and suffering in the past and is reasonably certain to experience pain and suffering in the future;

(e) he has expended large sums of money for necessary medical care, treatment and services in the past and will be required to expend money for necessary medical care, treatment and services in the future;

(f) he has had disability in the past and will continue to have disability in the future;

WHEREFORE, plaintiff, Gary Campbell, prays for judgment in his favor and against the defendant, McCarthy Brothers, a corporation, for an amount in excess of FIFTEEN THOUSAND DOLLARS ($15,000.00), together with costs of suit, prejudgment interest and such other and further relief as the Court and jury may deem just and proper.

COUNT II

(Unseaworthiness)

Now comes the plaintiff, Gary Campbell, by his undersigned attorneys, and for his cause of action against the defendant, McCarthy Brothers states as follows:

1. On or about October 29, 1991, plaintiff, Gary Campbell was employed by defendant, McCarthy Brothers, working as a seaman on a barge which was afloat on the Mississippi River near Alton, Madison County, Illinois.

2. That at all times herein mentioned, the defendant was a corporation organized and existing by virtue of law, which then or thereafter assumed all liabilities of plaintiff's employment, and now is in the business of owning and/or operating towboats and barges upon the inland waterways of the United States, including the Mississippi River, in the County of Madison, State of Illinois.

3. That the plaintiff, as a seaman, brings suit against the defendant under the provisions of the General Maritime Law of the United States, so much of which is pertinent hereto.

4. At said time and place, plaintiff Gary Campbell sustained severe injuries when walking across a wet barge, slipped and fell on a pile of debris.

5. That at said time and place the defendant's vessels and/or crew, and/or vessel equipment, and/or appurtenances were unseaworthy in one or more of the following respects, to-wit:

(a) did not provide plaintiff with a reasonably safe place in which to work;

(b) did not provide plaintiff with adequate assistance in the performance of his duties;

(c) did not warn plaintiff of the dangers in the area plaintiff was assigned to work when

defendant knew, or in the ordinary care should have known that said dangers existed;

(d) did not supervise the work being performed by plaintiff;

(e) did not inspect the vessel and/or barge to see that it was not defective and/or unsafe;

6. As a direct and proximate result, in whole or in part of the unseaworthiness of the defendant's vessel and/or crew, and/or vessel equipment, and/or appurtenances, plaintiff was injured in one or more of the following respects:

(a) he was made sick, sore, lame and disordered and suffered extensive injuries to his lower back;

(b) he has lost money from loss of wages in the past and is reasonably certain to lose wages in the future;

(c) he has suffered a loss of earning capacity;

(d) he has had pain and suffering in the past and is reasonably certain to experience pain and suffering in the future;

(e) he has expended large sums of money for necessary medical care, treatment and services in the past and will be required to expend money for necessary medical care, treatment and services in the future;

(f) he has had disability in the past and is reasonably certain to experience disability in the future;

WHEREFORE, plaintiff, Gary Campbell, prays for judgment in his favor and against the defendant, McCarthy Brothers, for an amount in excess of FIFTEEN THOUSAND DOLLARS ($15,000.00), together with costs of suit, prejudgment interest and such other and further relief as the Court and jury may deem just and proper.

COUNT III

(Maintenance & Cure)

Now comes the plaintiff, Gary Campbell, by his undersigned attorneys, and for his cause of action against the defendant, McCarthy Brothers, states as follows:

1. That on or about October 29, 1991, or on a date more certain to the defendant, plaintiff was employed by defendant working as a seaman on a barge which was owned, operated and/or controlled by defendant while the same was afloat on the Mississippi River.

2. That at all times herein mentioned, the defendant was a corporation organized and existing by virtue of law, which then or thereafter assumed all liabilities of plaintiff's employment, and now is in the business of owning and operating towboats and barges upon the inland waterways of the United States, including the Mississippi the County of County of [sic] Madison, State of Illinois.

3. That the plaintiff, as a seaman, brings suit against the defendant under the General Maritime Law of the United States, so much of which is pertinent hereto.

4. At said time and place, plaintiff Gary Campbell sustained severe injuries when walking across wet barge, slipped and fell on a pile of debris.

5. That as a result of said injuries the plaintiff has incurred extensive medical expense of treatment and other services.

6. That the plaintiff has not yet reached a point of maximum cure, and further medical expenses will be incurred in the future.

7. That the defendant has refused to meet its duty under General Maritime Law to provide its employee, the plaintiff, with full and adequate maintenance and cure for said injuries.

8. The defendant's refusal is in contravention of plaintiff's established maritime rights.

WHEREFORE, plaintiff, Gary Campbell, by his attorneys, The Lakin Law Firm, P.C., P.C. [sic] prays for judgment in his favor and against the defendant, McCarthy Brothers of not less than $40.00 per day, and to pay all reasonable medical expenses incurred in the diagnosis and treatment of his injuries, together with legal interest thereon from the judicial demand until paid, and for all costs of these proceedings, attorney fees and all general and equitable relief as the court deems just and proper.

COUNT IV

Now comes the plaintiff, Gary Campbell, by his undersigned attorneys, and for his cause of action against the defendant, Massman Construction, states as follows:

1. At all times mentioned herein defendant Massman Construction, was and is a lawfully organized corporation.

2. At all times mentioned herein plaintiff was employed by someone other than defendant Massman Construction in working with barges in the Illinois area.

3. On or about October 29, 1991, plaintiff Gary Campbell sustained severe injuries when walking across a wet barge, slipped and fell on a pile of debris.

4. The occurrence referred to herein took place while plaintiff was engaged in maritime employment on the navigable inland waters of the United States of America and therefore, the rights and liabilities of the parties hereto are governed by the General Maritime Law of the United States of America.

5. At said time and place, defendant Massman Construction was negligent in one or more of the following respects:

(a) failed to provide plaintiff with a reasonably safe place in which to work;

(b) failed to provide plaintiff with adequate assistance in the performance of his duties;

(c) failed to warn plaintiff of the dangers in the area plaintiff was assigned to work when defendant knew, or in the ordinary care should have known that said dangers existed;

(d) failed to supervise the work being performed by plaintiff;

(e) failed to inspect the vessel and/or barge to see that it was not defective and/or unsafe;

6. As a direct and proximate result of said negligence, plaintiff was caused to sustain the following injuries;

(a) he was made sick, sore, lame and disordered and suffered extensive injuries to his lower back;

(b) he has lost money from loss of wages in the past and is reasonably certain to lose wages in the future;

(c) he has suffered a loss of earning capacity;

(d) he has had pain and suffering in the past and is reasonably certain to experience pain and suffering in the future;

(e) he has expended large sums of money for necessary medical care, treatment and services in the past and will be required to expend money for necessary medical care, treatment and services in the future;

(f) he has had disability in the past and is reasonably certain to experience disability in the future;

WHEREFORE, plaintiff Gary Campbell, prays for judgment against defendant Massman Construction, a

corporation, in an amount in excess of that required to confer jurisdiction to the Circuit Division of this Court.

Respectfully submitted,

THE LAKIN LAW FIRM, P.C.

BY: /s/ L. Thomas Lakin

L. THOMAS LAKIN,
#1561464
ROY C. DRIPPS,
#06182013
Attorneys for Plaintiff
251 Old St. Louis Road
P.O. Box 27
Wood River, IL
62095-0027
(618) 254-1127

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

June 3 , 1996 .

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. FRANK H. EASTERBROOK, Cirucit Judge
Hon. ILANA DIAMOND ROVNER, Circuit Judge

No. 95-2880 IN THE MATTER OF THE COMPLAINT OF: McCARTHY BROTHERS COMPANY/CLERK BRIDGE, as Owner Pro Hac Vice of Barge #AEB1 for Exoneration from or Limitation of Liability, Petitioner-Appellant.	Appeal from the United States District Court for the Southern District of Illinois, East St. Louis Division. No. 94 C 72 **Paul E. Riley,** *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed by claimant Gary Campbell on May 21, 1996, all of the judges on the panel have voted to deny a rehearing and no judge in active service has requested a vote on the suggestion for rehearing en banc. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

JONES ACT
46 U.S.C. app. § 688 (1988)

§ 688. Recovery for injury to or death of seaman

(a) Application of railway employee statutes; jurisdiction

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

(b) Limitation for certain aliens; applicability in lieu of other remedy

(1) No action may be maintained under subsection (a) of this section or under any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action if the incident occurred – (A) while that person was in the

employ of an enterprise engaged in the exploration, development, or production of off-shore mineral or energy resources – including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment or personnel, but not including transporting those resources by a vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and (B) in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its territories, or possessions. As used in this paragraph, the term "continental shelf" has the meaning stated in article I of the 1958 Convention on the Continental Shelf.

(2) The provisions of paragraph (1) of this subsection shall not be applicable if the person bringing the action establishes that no remedy was available to that person – (A) under the laws of the nation asserting jurisdiction over the area in which the incident occurred; or (B) under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.

46 U.S.C.A. § 181. Liability of masters as carriers

If any shipper of platina, gold, gold dust, silver, bullion, or other precious metals, coins, jewelry, bills of any bank or public body, diamonds, or other precious stones, or any gold or silver in a manufactured or unmanufactured state, watches, clocks, or timepieces of any description, trinkets, orders, notes, or securities for payment of money, stamps, maps, writings, title deeds, printings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with any other material, furs, or lace, or any of them, contained in any parcel, or package, or trunk, shall lade the same as freight or baggage, on any vessel, without at the time of such lading giving to the master, clerk, agent, or owner of such vessel receiving the same a written notice of the true character and value thereof, and having the same entered on the bill of lading therefor, the master and owner of such vessel shall not be liable as carriers thereof in any form or manner; nor shall any such master or owner be liable for any such goods beyond the value and according to the character thereof so notified and entered. R.S. § 4281.

46 U.S.C.A. § 183. Amount of liability; loss of life or bodily injury; privity imputed to owner; "seagoing vessel"

(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

(b) In the case of any seagoing vessel, if the amount of the owner's liability as limited under subsection (a) of this section is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less than $60 per ton of such vessel's tonnage, such portion shall be increased to an amount equal to $60 per ton, to be available only for the payment of losses in respect of loss of life or bodily injury. If such portion so increased is insufficient to pay such losses in full, they shall be paid therefrom in proportion to their respective amounts.

(c) For the purposes of this section the tonnage of a seagoing steam or motor vessel shall be her gross tonnage without deduction on account of engine room, and the tonnage of a seagoing sailing vessel shall be her registered tonnage: *Provided,* That there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use.

(d) The owner of any such seagoing vessel shall be liable in respect of loss of life or bodily injury arising on distinct occasions to the same extent as if no other loss of life or bodily injury had arisen.

(e) In respect of loss of life or bodily injury the privity or knowledge of the master of a seagoing vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel.

(f) As used in subsections (b), (c), (d), and (e) of this section and in section 183b of this title, the term "seagoing vessel" shall not include pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels or their tenders, self-propelled lighters, non-descript self-propelled vessels, canal boats, scows, car floats, barges, lighters, or nondescript non-self-propelled vessels, even though the same may be seagoing vessels within the meaning of such term as used in section 188 of this title. R.S. § 4283; Aug. 29, 1935, c. 804, § 1, 49 Stat. 960; June 5, 1936, c. 521, § 1, 49 Stat. 1479.

46 U.S.C.A. § 185. Petition for limitation of liability; deposit of value of interest in court; transfer of interest to trustee

The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease. R.S. § 4285; June 5, 1936, c. 521, § 3, 49 Stat. 1480.

28 U.S.C.A. § 1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

* * *

Rule F. Limitation of Liability

(1) Time for Filing Complaint; Security. Not later than six months after receipt of a claim in writing, any vessel owner may file a complaint in the appropriate district court, as provided in subdivision (9) of this rule, for limitation of liability pursuant to statute. The owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the owner's interest in the vessel and pending freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of the statutes as amended; or (b) at the owner's opinion shall transfer to a trustee to be appointed by the court, for the benefit of claimants, the owner's interest in the vessel and pending freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of the statutes as amended. The plaintiff shall also give security for costs and, if the plaintiff elects to give security, for interest at the rate of 6 percent per annum from the date of the security.

(2) Complaint. The complaint shall set forth the facts on the basis of which the right to limit liability is asserted and all facts necessary to enable the court to determine the amount to which the owner's liability shall be limited. The complaint may demand exoneration from as well as limitation of liability. It shall state the voyage if any, on which the demands sought to be limited arose, with the date and place of its termination; the amount of all demands including all unsatisfied liens or claims of lien, in contract or in tort or otherwise, arising on that

voyage, so far as known to the plaintiff, and what actions and proceedings, if any, are pending thereon; whether the vessel was damaged, lost, or abandoned, and, if so, when and where; the value of the vessel at the close of the voyage or, in case of wreck, the value of her wreckage, strippings, or proceeds, if any, and where and in whose possession they are; and the amount of any pending freight recovered or recoverable. If the plaintiff elects to transfer the plaintiff's interest in the vessel to a trustee, the complaint must further show any prior paramount liens thereon, and what voyages or trips, if any, she has made since the voyage or trip on which the claims sought to be limited arose, and any existing liens arising upon any such subsequent voyage or trip, with the amounts and causes thereof, and the names and addresses of the lienors, so far as known; and whether the vessel sustained any injury upon or by reason of such subsequent voyage or trip.

(3) **Claims Against Owner; Injunction.** Upon compliance by the owner with the requirements of subdivision (1) of this rule all claims and proceedings against the owner or the owner's property with respect to the matter in question shall cease. On application of the plaintiff the court shall enjoin the further prosecution of any action or proceeding against the plaintiff or the plaintiff's property with respect to any claim subject to limitation in the action.

* * *